Supreme Court, U.S.
FILED

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

MARY E. ISBELL, DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL, JOSEPH ISBELL, THE STATE OF ARIZONA, MARICOPA COUNTY, THE CITY OF CHANDLER, and THE MARICOPA COUNTY SUPERIOR COURT,
Respondents.

Petition for a Writ of Certiorari to the Arizona Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As part of its comprehensive regulatory scheme regarding highway and rail safety, Congress enacted 23 U.S.C. § 409, which prohibits the discovery of "reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadways, or railroad-highway crossings, pursuant to Sections 130, 144, and 152 of [Title 23 of the U.S. Code] or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds" in both state and federal courts, "notwithstanding any other provision of law." The question presented is:

Whether the Congressionally-mandated bar on discovery set forth in § 409 prevents discovery of information compiled by states and railroads for the purpose of identifying, evaluating, or planning the safety enhancements of crossings, including items such as vehicle traffic counts, field reviews of crossings and cost estimates for crossing improvements.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Respondent Mary E. Isbell, plaintiff below, filed suit on her own behalf and on behalf of her children, Dennis, David, John, Marsha, and Joseph Isbell. The State of Arizona, Maricopa County, the City of Chandler, and Southern Pacific Transportation Company ("Southern Pacific") are defendants. The Maricopa County Superior Court was a nominal defendant in Southern Pacific's special action.

Pursuant to Rule 29.1, Southern Pacific discloses that its parent company is Southern Pacific Rail Corporation, and that Southern Pacific holds interests in the following subsidiaries (excluding wholly-owned subsidiaries):

Central California Traction Company
Harbor Belt Line Railroad
The Ogden Union Railway and Depot Company
Portland Terminal Railroad Company
Portland Traction Company
St. Louis Southwestern Railway Company
Southern Pacific Mexico, S.A. de C.V.
Sunset Railway Company
TTX Company
Denver Union Terminal Railway Company
The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and Terminal Company
Kansas City Terminal Railway Company
Southern Illinois and Missouri Bridge Company
Terminal Railroad Association of St. Louis

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Respondents.

Petition for a Writ of Certiorari to the Arizona Supreme Court

---

PETITION FOR A WRIT OF CERTIORARI

Southern Pacific Transportation Company ("Southern Pacific") respectfully petitions for a writ of certiorari to review the opinion of the Arizona Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arizona Supreme Court (App. *infra*, 1a) is reported at 890 P.2d 611, and its supplemental opinion (App. *infra*, 10a) is reported at 893 P.2d 1297. The opinion of the Arizona Court of Appeals (App. *infra*, 19a) is reported at 863 P.2d 271. The minute entry order of the Arizona Superior Court (App. *infra*, 30a) is unreported.

JURISDICTION

The Arizona Supreme Court issued its opinion on March 2, 1995. Southern Pacific timely filed a motion for reconsideration on March 17, 1995. The Arizona Supreme Court issued its supplemental opinion on April 27, 1995, through which it rejected the motion for reconsideration, and it issued its mandate on June 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

23 U.S.C. § 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadways, or railroad-highway crossings, pursuant to Sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

STATEMENT

This petition arises out of a railroad grade-crossing accident in which Richard Isbell died when his truck struck Southern Pacific's train. At issue is the applicability of § 409 which, by its terms, bars the discovery of information gathered for safety purposes.

A. The Background and Origin of § 409.

Section 409 is an integral part of Congress' pervasive and comprehensive regulation of rail and highway safety.

In order to understand the statute, it is necessary first to understand Congress' rail and highway safety programs.

1. ***The highway safety programs.***

The Federal Rail and Safety Act of 1970, 45 U.S.C. §§ 421-445 (FRSA), covers all areas of railroad safety. As part of the FRSA, Congress required the Secretary of Transportation to study and report to Congress on procedures to develop safer railroad crossings, 45 U.S.C. § 433(a), and to undertake "a coordinated effort towards the objective of developing and implementing solutions to the grade crossing problem . . . ." § 433(b).

In 1973, the Secretary filed the report mandated by § 433(a). Congress responded by amending § 130(d) of the Federal Highway Safety Act [1] so as to require the states, not the railroads, to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d).

Other sections of the Federal Highway Safety Act also obligate the states to undertake programs aimed at improving highway safety, which encompasses crossing safety. For instance, 23 U.S.C. § 152(a) declares:

> Each state shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations . . . including . . . unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations . . . and establish and implement a schedule of projects for their improvement.

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[1] The Highway Safety Act applies directly to railroad grade crossings by virtue of its definition of the term "highway" to include ". . . railroad-highway crossings . . ." 23 U.S.C. § 101.

In addition, 23 U.S.C. § 402(a) requires each state to have a highway safety program approved by the Secretary, and conditions the states' continued receipt of Highway Safety Act funding upon compliance with such requirements.

The Secretary has promulgated two sets of regulations that require the states to assume jurisdiction over the question of whether and when to upgrade all railroad crossing warnings: 23 C.F.R. Part 646 (related to federal-aid highways), and 23 C.F.R. Part 924 (related to all other public roads). Section 646.216 sets forth procedures that states must follow in federally-funded grade crossing improvement projects, and § 924.9 sets forth multiple requirements and standards for the states' identification and elimination of hazardous grade crossings.

23 C.F.R. § 646.214(B) adopts the Manual on Uniform Traffic Control Devices (MUTCD) as the "national standard for all traffic control devices installed on any street, highway . . . open to the public travel . . ." 23 C.F.R. § 655.603(a). The MUTCD establishes the standard for railroad crossing improvements pursuant to 23 CF.R. § 646.214(B). Part VIII of the MUTCD is devoted to "traffic control systems for railroad-highway grade crossings" and specifically imposes on the states the responsibility for surveying and determining the need for upgrading the protection of all railroad crossings. Compliance with the MUTCD by the states is required under 23 C.F.R. § 655.603. Subsection (d) also requires the states to adopt a program which includes provisions for the systematic upgrading of substandard traffic control devices and for the installation of devices needed to achieve conformity with the MUTCD. In turn, 23 C.F.R. § 1204.4, Guideline 13(I)(D)(5) requires that the states "[a]nalyze potentially hazardous locations, such as . . . railroad grade crossings and develop appropriate countermeasures."

Arizona follows the federal requirements set forth above. *See, Arizona Revised Statutes* ("A.R.S.") §§ 40-

337 to 337.03. Among other things, these statutes require the Arizona Corporation Commission to establish "an array of such crossings where the installation of automatic signals or devices should be considered during the year, or within a reasonable time thereafter depending upon the availability of monies, materials, labor, and other factors involved in such installation." A.R.S. § 40-337.03. The State, in turn, requires the railroads to obtain and provide the data necessary to form the array and to evaluate the costs of updating particular crossings. *See, e.g.*, Arizona Administrative Rule 14-5-104(C)(10) ("When authorization for preliminary engineering and estimate or any federal-aid funding crossing improvement projects is submitted to the railroad, it shall be completed by the railroad and returned to the Arizona Department of Transportation within 60 days.")

This systematic, federally-mandated approach to highway safety improvements has been highly successful in saving lives. For example, the 1991 Annual Report on Highway Safety Improvement Programs, issued by the United States Department of Transportation, reports that, since 1974, the federal government funded more than 25,300 projects under the Rail-Highway Crossing Program (23 U.S.C. § 130) to reduce or eliminate hazards at railroad-highway crossings, resulting in the reduction of fatal, nonfatal injury, and combined fatal-plus-nonfatal injury accident rates by 38, 62, and 66 percent, respectively. *Id.* at IV-5. The Department of Transportation estimated that the Rail-Highway Crossing Program has saved over 6,400 lives and prevented 26,500 nonfatal injuries. *Ibid.* Similarly, since 1974, the Hazard Elimination Program (23 U.S.C. § 152), a second program, provided funds for more than 30,000 safety improvement projects, reducing fatal, nonfatal injury, and combined fatal-plus-nonfatal injury accident rates by 48, 24, and 25 percent, respectively. The Department of Transportation estimated that the Hazard Elimination Program prevented over 19,000 deaths and 520,000 nonfatal injuries. *Ibid.*

2. Section 409.

Section 409 was enacted as part of the Surface Transportation and Uniform Relocation Assistance Act of 1987. It explicitly bars discovery of "reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of . . . railroad-highway crossings . . .", "notwithstanding any other provision of law." Section 409 is an integral part of Congress' pervasive and comprehensive regulation of rail and highway safety. It specifically manifests Congress' intent to preclude the use of that regulation by private litigants for purposes which would defeat the broader interests of public safety promoted by the regulatory framework. Accordingly, courts have routinely held that § 409's purpose is to encourage candor and protect the decision-making process through which these federal programs are administered by protecting information. *E.g., Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992) ("the underlying intent of the statute is to facilitate candor . . . and to prohibit federally required record-keeping from being used as a tool . . . in private litigation"); *Harrison v. Burlington Northern R.R. Co.*, 965 F.2d 155, 156 n.3 (7th Cir. 1992) ("its purpose was to facilitate candor . . . or to keep the record-keeping required by federal provisions from providing an additional, virtually no-work tool for direct use in private litigation"); *Perkins v. Ohio Dep't of Transp.*, 584 N.E.2d 794, 802 (Ohio App. 1989) ("[T]he apparent purpose of this provision is to foster the free flow of safety-related information by precluding the possibility that such information later would be admissible in civil suits. The interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions.").

Many courts have broadly construed § 409, prohibiting experts from considering protected materials and prohibiting the authors of such documents from testifying to their contents. For example, in *Robertson*, plaintiff was injured

in a car-train collision and offered at trial (1) a newspaper article that identified the crossing as the most dangerous one in the state, (2) the formula used by the state to evaluate the hazardousness of crossings, and (3) the state's automobile count at the crossing. The district court excluded this evidence under § 409, and the Eighth Circuit affirmed this exclusion on appeal. The Eighth Circuit found that the automobile count and formula were compiled to evaluate safety pursuant to federal law, rendering them protected and inadmissible, and found it immaterial that the information was also available for other purposes. The court also held that the newspaper article was inadmissible because it was prepared using the state's data, and that plaintiff's expert was properly precluded from using such information or data in forming his opinions.

B. Facts of the Instant Case and Proceedings Below.

In 1983, the State of Arizona placed the crossing at issue in its array for the installation of automatic gates in the indefinite future. Maricopa County applied to the Arizona Corporation Commission for permission to install the gates in 1985, and authority was granted in 1986 when the Corporation Commission authorized the installation of gates when labor and materials were available. No specific date was set for the installation of gates; and they were not yet installed in April, 1990, when the accident occurred.

Isbell sued the State, Southern Pacific, the City of Chandler, and Maricopa County, claiming, among other things, that they were negligent in failing to post additional warnings at the crossing, and in failing to install automatic gates at the crossing. Isbell served discovery requests on the State and Southern Pacific seeking, among other things, information regarding grade crossing improvement projects throughout Arizona, including numerous items compiled by Southern Pacific and the State pursuant to their statutory obligations. Specifically, Isbell

sought the date that the crossing first appeared on the array for the installation of gates; the date of any field reviews and engineering plans; the date and amount of Southern Pacific's cost estimates for improvements; the date that the Commission ordered the crossing to be improved, and the cost of the improvements; the date of meetings regarding the crossing; each letter regarding the crossing; written criteria for evaluating whether crossings merit automatic gates; Southern Pacific's evaluation of the crossing; the number of grade crossings in Arizona as of January 22, 1986 at which the Commission had entered an order granting a governmental entity authority to have Southern Pacific install automatic gates but at which the gates had not yet been installed, and information for each crossing, including the dates of orders; and the location of other Arizona grade crossings at which automatic gates were planned but not installed as of April 10, 1990, along with the dates of the orders.

Each of these discovery requests is improper under § 409 and Congress' comprehensive statutory scheme governing crossing improvements throughout the United States, under which the states, as well as the railroads, became obligated to compile a wide variety of statistical and other data regarding grade crossings. Accordingly, the State and Southern Pacific objected to this discovery under § 409. The trial court overruled the objections (App. at 33a-34a), the Arizona Court of Appeals reversed and upheld these objections (App. at 29a), and the Arizona Supreme Court reversed the Court of Appeals (App. at 9a), prompting this petition.

C. The Arizona Supreme Court's Decision.

The Arizona Supreme Court adopted a position that was not briefed or argued by any party or suggested by any of the reported cases construing § 409. Specifically, it held that § 409 only protects documents, and does not "protect facts within the personal knowledge of a party, unless that knowledge comes solely from the protected

document," despite the fact that § 409 expressly protects "data." 890 P.2d at 613 (App. at 5a). Then, it held that the terms "reports, surveys, schedules, lists and data" are "words of art," and that "the documents exempt from discovery and excluded from evidence under § 409 are precisely the documents described and prepared under the authority of [23 U.S.C.] §§ 130, 144, and 152, and not others." 890 P.2d at 614 (App. at 8a). Having so held, the Arizona Supreme Court refused to evaluate any of the specific interrogatories, stating that the record was insufficient in light of its interpretation of the statute.

REASONS FOR GRANTING THE PETITION

I. THE ARIZONA SUPREME COURT'S DECISION IS PLAINLY ERRONEOUS AND EVISCERATES THE PROTECTION CONGRESS ACCORDED THE STATES AND RAILROADS WHEN IT ENACTED § 409.

The Arizona Supreme Court's holding misreads the clear meaning of § 409 and is plainly incorrect for a number of reasons. First, the Arizona Supreme Court's ruling is plainly inconsistent with the express language of § 409. Section 409 explicitly protects reports, surveys, schedules, lists, and data *either* (1) if they were compiled pursuant to §§ 130, 144, and 152, *or* (2) if they were compiled *for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.* The underlined phrase belies the Arizona Supreme Court's suggestion that the words "reports, surveys, schedules, lists and data" are merely words of art defined in §§ 130, 144, and 152, because § 409 explicitly protects information generated *either* pursuant to §§ 130, 144, and 152 *or* for the purpose of developing other safety projects that may utilize federal funds; that is, the structure of § 409 dictates that those words also protect information generated outside of §§ 130, 144, and 152. By overlooking the underlined phrase, the Arizona Supreme Court's opinion

violates the rule that, "[i]n construing a statute, we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S. Ct. 2326, 2331 (1979) (also holding that "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise").

Second, the Arizona Supreme Court's suggestion that the words "reports, surveys, schedules, lists [and] data" are words of art defined by §§ 130, 144, and 152 is not supported by those sections themselves. For example, the Arizona Supreme Court's suggestion that § 144(e) defines "data" as the government's inventory, classifications, and prioritizations for bridge projects (890 P.2d at 614, App. at 8a) finds no basis in § 144(e), which merely uses the word "data" in stating that the Secretary of Transportation shall allocate available funds for bridge work "based upon the lastest available data . . . ." Nothing in this phrase suggests that "data" means only documents prepared by the Secretary, or that "data" includes only reports, etc., generated under § 144's bridge repair program. Indeed, the federal government uses the word "data" to encompass other facts in 23 C.F.R. § 924.9(a)(1), which was enacted in 1983 (four years before § 409); that regulation requires the States to institute a program which will include "a process for collecting and maintaining a record of accident, traffic and highway *data*, including for railroad-highway grade crossings, the characteristics of both highway and train traffic." (Emphasis supplied.) Accordingly, when § 409 was enacted in 1987, federal regulations already classified the characteristics of highway and train traffic (e.g. traffic counts) as "data."

Third, the Arizona Supreme Court's reading of § 409 is inconsistent with well-settled principles of statutory construction. Two canons of statutory construction fatally undermine the Arizona Supreme Court's decision. One, courts must give Congress' words their ordinary

meaning. *Smith v. United States*, —— U.S. ——, 113 S. Ct. 2050, 2054 (1993). Two, courts must also interpret Congress' words in light of its purpose in enacting the statute. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S. Ct. 986, 995 (1983). Section 409 protects, among other things, data compiled in connection with highway safety programs. "Data" is the plural form of "datum," and a "datum" is a fact. *The Compact Edition of the Oxford English Dictionary* (1971) Vol. I at 648. Indeed, Isbell's counsel, in making a contrary argument, conceded to the Arizona Court of Appeals that, "We're not reading the statute as it's written." 863 P.2d at 274 (App. at 23a). In addition to being entirely consistent with common usage, the use of "data" to mean "facts" is consistent with 23 C.F.R. § 924.9(a)(1), which, as noted above, lists highway and traffic counts as "data." Nothing in any rational definition of "data" suggests that only written data is protected, and Congress' purpose of fostering candor would be thwarted if the contents of protected documents could be obtained by deposing their authors, whose knowledge would, in the Arizona Supreme Court's view, be discoverable because they have personal knowledge that did not come solely from a protected document.

Similarly, and contrary to the Arizona Supreme Court's suggestion, "compiled" does not mean "originally compiled," nor does it mean "compiled solely for a specific purpose." In *Robertson*, the Eighth Circuit gave short shrift to this argument based on the plain language of § 409:

> Appellant's assertion that the formula and automobile count were admissible because such information was not collected or utilized solely for federal funding projects is without merit. Although such information was available for other uses and purposes, the statute's mandatory language requires exclusion of such evidence at trial.

954 F.2d at 1435 n.3. This holding is consistent with this Court's express determination that the term "com-

piled" does not mean "originally compiled," even under the restrictive construction of that term required by the Freedom of Information Act. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 110 S. Ct. 471, 476 (1989):

> The wording of the phrase under scrutiny is simple and direct: "compiled for law enforcement purposes." The plain words contain no requirement that compilation be effected at a specific time. The objects sought merely must have been "compiled" when the Government invokes the Exemption. A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents. This definition seems readily to cover documents already collected by the Government originally for non-law-enforcement purposes. The Court of Appeals, however, throughout its opinion would have the word "compiled" mean "originally compiled." We disagree with that interpretation for, in our view, the plain meaning of the word "compile," or, for that matter, of its adjectival form "compiled," does not permit such refinement.

II. THE ARIZONA SUPREME COURT'S DECISION THREATENS THE DECISION-MAKING PROCESS THAT CONGRESS SOUGHT TO PROTECT AND THUS THREATENS CONGRESS' SAFETY PROGRAMS.

The issue raised by this petition is of grave importance. The Arizona Supreme Court's opinion strikes at the heart of Congress' safety improvement program (which covers all roadway hazards, not merely grade crossing hazards) by threatening the candor and the free flow of safety-related information that underlies the entire program and ensures that federal money will be spent prudently and where most needed. If reports and data concerning potential highway safety hazards are subject to discovery in tort actions, states and private parties will likely be deterred from compiling complete and accurate information about such hazards. As a result, federal highway safety

programs, which depend on information about safety problems supplied by the states and private entities such as railroads, will be jeopardized. Congress itself has recognized the dangers inherent in allowing the discovery of protected information; in response to some early cases suggesting that § 409 did not prohibit discovery of the protected information, but only its admissibility at trial, Congress amended § 409 in 1991 to make clear that it applies equally to the discovery of protected information.

III. THE ARIZONA SUPREME COURT'S DECISION CANNOT BE RECONCILED WITH OTHER DECISIONS, INCLUDING CONTROLLING AND DIRECTLY CONTRARY HOLDINGS BY THE EIGHTH CIRCUIT.

The Arizona Supreme Court's opinion cannot be reconciled with *Lusby v. Union Pacific R. Co.*, 4 F.3d 639 (8th Cir. 1993), *Robertson, supra*, *Miller v. Bailey*, 621 So. 2d 1174 (La. App. 1993), *Hagerty v. Southern Ry. Co.*, 133 F.R.D. 34 (E.D. Mo. 1990), or *Claspill v. Missouri Pacific R. Co.*, 793 S.W.2d 139 (Mo. 1990). *Lusby* expressly holds that vehicle counts, train traffic counts, and information regarding earlier accidents at a crossing are protected data under § 409, even if that information was not compiled solely for federal purposes and even if that information is available for other purposes. As noted above, *Robertson* holds that traffic counts and the state's formula for evaluating the hazardousness of crossings are protected under § 409 even if that information is also available for other purposes. *Miller* holds that § 409 protects a state trooper's letter to the Department of Transportation which indicates that "no parking" signs are needed on a highway. *Hagerty* holds that *railroad* documents, including letters, correspondence, and internal memoranda related to proposed, considered, or undertaken improvements, are protected under § 409.[2]

[2] Section 409 was amended in 1991 to clarify that it barred discovery of information; prior to that time, the caselaw split on

Claspill prohibits the use of a field inspection form proposing the addition of flashing lights at a railroad crossing, as well as testimony identifying and explaining a list of the most dangerous railroad crossings in the state. This conflict between the Arizona Supreme Court, the Eighth Circuit Court of Appeals, and various other courts, coupled with the importance of the issues, warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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whether § 409 applied to discovery issues. *Hagerty* followed the line of cases holding that § 409 did not affect discovery, but did preclude the use of the railroad documents at trial.

APPENDIX A

[Filed Mar. 2, 1995]

SUPREME COURT OF ARIZONA
En Banc

Supreme Court No. CV-93-0106-PR

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent,

MARY E. ISBELL, for and on her behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE IBELL,
Real Parties in Interest.

THE STATE OF ARIZONA, acting by and through the Arizona Department of Transportation and the Arizona Corporation Commission,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent,

MARY E. ISBELL, for and on her behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,

Real Parties in Interest.

Appeal from the Superior Court of Arizona
in Maricopa County
The Honorable Michael A. Yarnell, Judge

Court of Appeals No. 1 CA-SA 93-0003;
1 CA-SA-93-0004 [Consolidated]

Maricopa County No. CV-91-19192

OPINION

MARTONE, Justice.

We are asked to define the nature, scope and effect of 23 U.S.C. § 409 on the discoverability and admissibility of evidence in railroad-crossing tort claims.

I. BACKGROUND

This is a wrongful death action brought by Mary Isbell as the surviving spouse of her husband, Richard, who died in 1990, when the milk truck he was driving collided with a train at a crossing in Chandler. Among other things, Mary alleges that the crossing was unreasonably dangerous and that both Southern Pacific Railroad Com-

pany and the State of Arizona are responsible for its condition. Seven years earlier, in 1983, the state identified the crossing as one at which automatic gates ought to be installed to improve its safety. In 1986, the corporation commission authorized the installation, but by 1990, when Richard died, the gates had not been installed.

Through discovery, Mary sought information on why the automatic gates had not been installed. She wanted facts about the crossing and other crossings in the state. She wanted to know why the corporation commission concluded that the crossing should be improved. The state moved for a protective order. Isbell moved for an order compelling discovery not only from the state, but from Southern Pacific. The state and Southern Pacific argued that the information sought was neither subject to discovery nor admissible in evidence pursuant to 23 U.S.C. § 409, which provides as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for any other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The state and Southern Pacific argued that the statute exempted from discovery not only the reports, surveys, schedules, lists, or data compilations made for the purposes identified in the statute, but also all the facts in those reports even if available from other sources. Isbell

argued that if otherwise part of a federal improvement program, the statute only protected the reports themselves, and not the underlying facts. The trial court agreed with Isbell. It held that:

> While the actual 'reports, surveys, schedules, lists, or data' compilations (or calculations) prepared expressly for 'the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings' are neither discoverable nor admissible, simple factual information gathered for or contained in such reports or compilations is discoverable and is admissible *if* otherwise relevant and probative . . . . [a]n otherwise discoverable or admissible fact is not made non-discoverable or non-admissible simply by its inclusion in a privileged document or conversation.

Minute entry of December 3, 1992 at 27-28.

The trial court therefore denied the state's motion for protective order and granted Isbell's cross-motion for order compelling discovery from the state and from Southern Pacific.

The state and Southern Pacific filed petitions for special action relief in the court of appeals. That court granted relief and held that in addition to the documents described in § 409, data that ends up in those documents, from whatever source derived, even a newspaper article, are neither subject to discovery nor admissible. *Southern Pac. Transp. Co. v. Yarnell*, 176 Ariz. 552, 863 P.2d 271 (App. 1993). We granted review.

II. ANALYSIS

So far as we are aware, the history of 23 U.S.C. § 409 is nonexistent. It is thus especially important to focus on the language itself. We diagram § 409 as follows. In relevant part, it covers:

(1) reports, surveys, schedules, lists or data;

(2) compiled;

(3) for the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings;

(4) pursuant to 23 U.S.C. §§ 130, 144, and 152; and

(5) a location mentioned in such reports, surveys, schedules, lists or data.

Thus broken down, it seems evident that each of these requirements must be met before the discovery and admissibility provisions become operative. If we look only to words, we agree with the trial court that the statute immunizes from discovery and admissibility the documents prepared in connection with the relevant federal safety program. This would allow those associated with the program to prepare such documents without fear that they would be produced. But the statute does not purport to protect facts within the personal knowledge of a party, unless that knowledge comes solely from the protected document. For example, a railroad may know that there were twenty such accidents at a particular crossing. Compiling this data for the safety improvement program under the statute makes the compilation itself nondiscoverable and nonadmissible. But the railroad would have to reveal that there were twenty such accidents. It would not have to reveal any report, survey, schedule, list or data compilation made in connection with the safety enhancement program. This seems to us to comport with both the express language of the statute and its spirit. Construing the statute to cover all facts that ultimately end up in such compilations, from whatever source derived, would go far beyond protecting the safety enhancement process and indeed would turn that process on its head. It would prevent the parties from proving claims that could otherwise have been proven had there been no safety enhancement project. The Su-

preme Court has held that the federal railroad safety enhancement program does not preempt state damage claims. *CSX Transp., Inc. v. Easterwood*, —— U.S. ——, 113 S. Ct. 1732 (1993). The Court said:

> [T]he scheme of negligence liability could just as easily complement these regulations by encouraging railroads—the entities arguably most familiar with crossing conditions—to provide current and complete information to the state agency responsible for determining priorities for improvement projects . . . .

—— U.S. at ——, 113 S. Ct. at 1739.

But state damage claims can only be proved with facts. The Supreme Court has acknowledged that the federal statutory scheme may peacefully coexist with the state tort scheme. In fact, they complement each other. But the breadth of exemption from discovery and admissibility argued by Southern Pacific and the state, and acknowledged by the court of appeals, would sacrifice the state tort scheme on the altar of the federal statutory scheme.

We disagree with the court of appeals' assertion that "the clear weight of authority holds that data as well as documents are protected by the statute." *See Southern Pac. Transp. Co.*, 176 Ariz. at 555, 862 P.2d at 274. So far as we know, only the United States Court of Appeals for the Eighth Circuit reads the statute so broadly as to preclude data from other sources once that data is also complied in a statutory report. *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (excluding even newspaper article); *accord Lusby v. Union Pac. R.R.*, 4 F.3d 639, 641 (8th Cir. 1993). Recently, the Tennessee Court of Appeals, relying on our court of appeals decision, adopted a similar interpretation. *See Seaton v. Johnson*, No. 01-A-01-9408-CH-00372, 1995 WL 33681, at *6 (Tenn. App., Jan. 27, 1995).

On the other hand, several courts have specifically rejected such a broad interpretation, and instead read the

statute to allow discovery of the underlying facts. *Rick v. State Dep't of Transp. and Dev.*, 630 So. 2d 1271, 1276 (La. 1994) (admitting accident reports, traffic counts and other raw data); *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So. 2d 170, 173 (La. 1993) ("Section 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations"); *Light v. State*, 560 N.Y.S.2d 962, 965 (Ct. Cl. 1990) (the statute excludes reports, but "does not, expressly or by implication, make the information contained in such reports confidential"); *cf. Kitts v. Norfolk and W. Ry.*, 152 F.R.D. 78, 81 (S.D.W.Va. 1993) (Section 409 "does not accord protection for documents or data prepared or compiled for some entirely separate and distinct purpose, even if the contents of the same, or parts thereof, eventually become ingredients thrown into a soup kettle with a distinct flavor of safety enhancement.").

Although other cases have held that the inadmissibility of the reports extended to testimony based directly on them, they never reached the issue of the discoverability or admissibility of the underlying facts. *Harrison v. Burlington N. R.R.*, 965 F.2d 155, 160 n.9 (7th Cir. 1992) (excluding official report and testimony based upon it, but not addressing "their observations of the crossing that were not contained in the letter and report"); *Sawyer v. Illinois Cent. Gulf R.R.*, 606 So. 2d 1069, 1073 (Miss. 1992) (excluding reports and testimony as to their contents); *Claspill v. Missouri Pac. R.R.*, 793 S.W.2d 139, 140 (Mo. 1990) (excluding a list of "most dangerous railroad crossings" prepared under § 409 and testimony based on it); *cf. Perkins v. Ohio Dep't of Transp.*, 584 N.E.2d 794, 802 (Ohio App. 1989) (excluding evidence of any accidents "which came to the attention of the defendant solely as a result of its programs operated pursuant to a federal hazard elimination

program" but ambiguous as to whether that evidence is admissible from sources apart from the statutory report).

Of the relatively few cases on point, we find the logic of those courts narrowly interpreting § 409 to be directly supported by statutory analysis. Statutes, of course, ought to be read in ways that give an integrated meaning to all their parts. 23 U.S.C. § 409 includes "reports," "surveys," "schedules," "lists," and "data," compiled "pursuant to sections 130, 144 and 152 of this Title." Section 409 uses words like "reports" and "surveys" in the same way in which those words are used in §§ 130, 144, and 152. For example, 23 U.S.C. § 130(d), requires states to conduct "a *survey* of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a *schedule* of projects for this purpose." (Emphasis added). Thus when § 409 refers to "surveys" and "schedules," it is referring specifically to those surveys and schedules prepared pursuant to 23 U.S.C. § 130(d). Similarly, 23 U.S.C. § 144(e) (a highway bridge replacement program not applicable here) requires the federal government to inventory, classify, and prioritize highway bridges and categorizes this as *"data."* (Emphasis added). And, 23 U.S.C. § 152 (hazardous roads), requires the states to *"survey"* roads, implement a *"schedule"* of projects for improvement, and submit a *"report"* to the federal government on progress being made to implement highway safety improvement projects. 23 U.S.C. § 152(a), (g) (emphasis added).

It can thus be seen that each of the categories of information described in 23 U.S.C. § 409 have their origins in the programs described in 23 U.S.C. §§ 130, 144, and 152. These are words of art. This is powerful support for the proposition that the documents exempt from discovery and excluded from evidence under § 409 are precisely the documents described and prepared under the authority of §§ 130, 144, and 152, and no others.

This would promote the integrity of the federal regulatory scheme without compromising the integrity of the parallel state tort system.

We thus reject a broad interpretation of 23 U.S.C. § 409 and agree with the view of those courts giving § 409 its plain meaning. It follows, therefore, that the trial judge did not err in denying the state's motion for protective order and granting Isbell's cross-motion for order compelling discovery from the state and from Southern Pacific. The record here is insufficient for us to apply our understanding of this statute to the specific materials which were the subject of the motions. We therefore vacate the opinion of the court of appeals, affirm the order of the trial court, and remand for further proceedings consistent with this opinion.

FREDERICK J. MARTONE
Justice

CONCURRING:

STANLEY G. FELDMAN
Chief Justice

JAMES MOELLER
Vice Chief Justice

ROBERT J. CORCORAN
Justice

THOMAS A. ZLAKET
Justice

APPENDIX B

[Filed Apr. 27, 1995]

SUPREME COURT OF ARIZONA
En Banc

Supreme Court No. CV-93-0106-PR

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent,

MARY E. ISBELL, for and on her behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,
Real Parties in Interest.

THE STATE OF ARIZONA, acting by and through the Arizona Department of Transportation and the Arizona Corporation Commission,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent,

MARY E. ISBELL, for and on her own behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,

Real Parties in Interest.

Supreme Court No. CV-93-0106-PR
Court of Appeals No. 1 CA-SA 93-0003;
1 CA-SA-93-0004 [Consolidated]

Maricopa County No. CV-91-19192

SUPPLEMENTAL OPINION

MARTONE, Justice.

Southern Pacific, joined by the State of Arizona, has filed a motion for reconsideration. One point merits discussion. Southern Pacific argues that our statutory diagram, appearing at page 5 of the slip opinion, is incorrect because it does not make reference to that part of 23 U.S.C. § 409 which refers to other federally funded highway safety improvement projects. For that same reason, Southern Pacific quarrels with our statement that "the documents exempt from discovery and excluded from evidence under § 409 are precisely the documents described and prepared under the authority of §§ 130, 144, and 152, and no others," as appearing at page 9 of the slip opinion.

Our opinion makes it clear that we diagramed § 409 "[i]n relevant part." Slip op. at 5. This is a railroad crossing case. There was no need for us to diagram portions of the statute which had no effect on this case except as it may have been necessary to explain particular

portions of the statute. As Isbell's response makes clear, our holding applies to the entirety of § 409, whether we are talking about railroad crossings under 23 U.S.C. § 130(d), (mentioned and relevant), highway bridge replacement programs under 23 U.S.C. § 144(e) (mentioned and noted as "not applicable here"), slip op. at 9, hazardous roads under 23 U.S.C. § 152 (mentioned and not applicable here), or other highway safety programs (not mentioned and not applicable here). Our use of the words "no others," was obviously in the context of the specific three sections then under discussion, but the statute applies to the generic category of "any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds."

For all these reasons, the motions for reconsideration are denied.

FREDERICK J. MARTONE
Justice

CONCURRING:

STANLEY G. FELDMAN
Chief Justice

JAMES MOELLER
Vice Chief Justice

ROBERT J. CORCORAN
Justice

THOMAS A. ZLAKET
Justice

APPENDIX C

[Filed May 24, 1995]

SUPREME COURT OF ARIZONA

Supreme Court No. CV-93-0106-PR

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent,

MARY E. ISBELL, for and on her behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,
Real Parties in Interest.

THE STATE OF ARIZONA, acting by and through the Arizona Department of Transportation and the Arizona Corporation Commission,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent,

MARY E. ISBELL, for and on her own behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,

Real Parties in Interest.

Court of Appeals No. 1 CA-SA 93-0003;
1 CA-SA-93-0004 [Consolidated]

Maricopa County No. CV-91-19192

ORDER

The court has before it Southern Pacific's application for a stay, Isbell's response, and Southern Pacific's reply.

In granting or denying a stay, the court considers the probability of success on the merits, the harm that would be caused the moving party in the absence of a stay, the harm that would be caused the opposing party if a stay is granted, and the public interest.

In light of this court's opinion, we weigh the probability of success on the merits as rather low. The harm that might be caused plaintiff in the absence of a stay is that the documents must be released. But given the nature of what kinds of documents these are, no real harm can come from them except within the context of the underlying tort action. That sort of harm can always be remedied on appeal in the event that the stay should have been granted. In light of the imminency of the summer recess of the Supreme Court of the United States, and the briefing schedule for petitions for writs of certiorari, it is unlikely that that court will rule on the petition until the fall

of 1995. Thus the harm associated with the delay is significant. Finally, the public interest is served by disclosure of relevant information. There is no harm to any federally funded program.

For all these reasons, Southern Pacific's application for the stay of the issuance of a mandate is DENIED.

Dated this 24th day of May, 1995.

/s/ Frederick J. Martone
FREDERICK J. MARTONE
Justice

APPENDIX D

SUPREME COURT OF ARIZONA

Supreme Court No. CV-93-0106-PR

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent,

MARY E. ISBELL, for and on her behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,
Real Parties in Interest.

THE STATE OF ARIZONA, acting by and through the Arizona Department of Transportation and the Arizona Corporation Commission,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent Judge,

MARY E. ISBELL, for and on her own behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,

Real Parties in Interest.

Court of Appeals No. 1 CA-SA 93-0003;
1 CA-SA-93-0004 [Consolidated]

Maricopa County No. CV 91-19192

MANDATE REMANDING TO THE SUPERIOR COURT

TO: Superior Court of Maricopa County, Arizona, in relation to Cause No. CV 91-19192

The above entitled and numbered cause was presented in your Court and was brought before the Court of Appeals, Divison One, Nos. 1 CA-SA 93-0003 and 1 CA-SA 93-0004, in the manner prescribed by law. That Court filed its Opinion on the 27th day of May, 1993. A Petition for Review was granted by this Court on the 15th day of December, 1993.

This Court, having considered the matter, filed its Opinion on the 2nd day of March, 1995, affirming the order of the trial court entered in the above entitled cause. A Supplemental Opinion was filed on April 27, 1995.

The Opinion of the Court of Appeals is vacated and the case is remanded to the trial court.

Two Motions for Reconsideration were filed and were denied by order of this Court on the 25th day of April, 1995.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be held in this matter as shall be required to comply with the Court's Opinions (copies attached to this original Mandate).

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of the Supreme Court of the State of Arizona this 2nd day of June, 1995.

/s/ Noel K. Dessaint
NOEL K. DESSAINT
Clerk

APPENDIX E

[Filed May 27, 1993]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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1 CA-SA 93-0003, 1 CA-SA 93-0004
(Consolidated)

DEPARTMENT E

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,
Petitioner,

v.

HON. MICHAEL A. YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent,

MARY E. ISBELL, for and on her own behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,
Real Parties in Interest.

THE STATE OF ARIZONA, acting by and through the Arizona Department of Transportation and the Arizona Corporation Commission,
Petitioner,

v.

HON. MICHAEL YARNELL, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,
Respondent Judge,

MARY E. ISBELL, for and on her own behalf as surviving spouse of RICHARD LEVONNE ISBELL, and for and on behalf of DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL and JOSEPH ISBELL, the surviving children of RICHARD LEVONNE ISBELL,

Real Parties in Interest.

Petition for Special Action
Maricopa County Superior Court
Cause No. CV 91-19192
The Honorable Michael A. Yarnell, Judge

OPINION

LANKFORD, Judge,

In this special action, the petitioner railroad seeks relief from a superior court order compelling the railroad to produce documents which it contends are privileged.

We accepted jurisdiction and granted relief by a prior order which directed the respondent court and judge to not compel the disclosure. Our order stated that an opinion would follow, and this is the promised opinion. We have jurisdiction pursuant to Ariz. Rev. Stat. Ann. ("A.R.S.") section 12-120.21 and the Rules of Procedure for Special Actions. Special action jurisdiction may properly be exercised in cases involving the assertion of a privilege against discovery orders. *See* Jefferson L. Lankford & Paul Ulrich (eds.), 1 ARIZONA APPELLATE HANDBOOK § 7.2.2 at 7-6 (3d ed. 1992).

The privilege claimed by the railroad rests on a federal statute. That statute, 23 U.S.C. section 409, provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be SUBJECT TO DISCOVERY OR admitted into evidence in a Federal or State court PROCEEDING or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The capitalized language was added by amendment in 1991. 23 U.S.C.A. § 409 (West Supp. 1993) (effective Dec. 18, 1991).

This discovery dispute arose in a wrongful death action filed by the real parties in interest, the survivors of Richard Isbell. In 1990, a milk truck driven by the decedent collided with a Southern Pacific train at a crossing. The wrongful death claim alleges, among other things, that the crossing signals were inadequate.

Prior to the accident, the Arizona Corporation Commission, which regulates railroads, had designated this crossing for improvement at a later indefinite date by installing automatic gates. Subsequently, Maricopa County applied for authority to install the gates. The Commission granted the authority and issued an order directing the railroad to install the gates when resources were available.[1] However, the automatic crossing gates had not yet been installed when the accident occurred.

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[1] This order is not in the record. However, at oral argument the real parties in interest and the railroad agreed that the order did not designate a specific time for installation but rather directed the railroad to install the gates when it had the available resources.

The plaintiffs sought discovery from the railroad of information regarding this and other rail crossings in Arizona. By interrogatories and requests for the production of documents, the plaintiffs requested information about delay in installing the automatic gates after the Commission had authorized them, about all other crossing upgrades in the State of Arizona during the same time period, and about Commission action regarding the crossing upgrade. Among other things, plaintiffs sought the following specific information: (1) the dates of field reviews of the crossing; (2) the cost estimates and planning and construction dates for the crossing improvement; (3) written criteria for evaluating crossings for possible automatic gates; and (4) the number and location of crossings for which authority had been issued to install automatic gates, and installation information for each such crossing.

The railroad filed a motion for protective order and the plaintiffs filed a motion to compel discovery. The superior court denied the former motion and granted the latter. In a detailed minute entry order, the court interpreted 23 U.S.C. section 409 as protecting only the "reports, surveys, schedules, lists or data" mentioned in the statute and as exposing to discovery "simple factual information gathered for or contained in such reports or compilations . . . ." "An otherwise discoverable or admissible fact," the court reasoned, "is not made non-discoverable or non-admissible simply by its inclusion in a privileged document or conversation." Consequently, the court ordered that "factual information"—but not reports, other documents, opinions or conclusions—was discoverable.

The disposition of this dispute is determined by the federal statute. Although the plaintiffs have made a state law wrongful death claim, the federal statute overrides Arizona's discovery rules by virtue of the Supremacy Clause. U.S. Const. art. VI, cl.2. We are bound to follow the federal statute.

The statute protects the information from discovery. The statutory privilege sweeps broadly indeed, but that is the rule Congress enacted. The 1991 amendment to section 409 clarified that not only is the protected data inadmissible in court, but also shall "not be subject to discovery . . . or considered for other purporses . . . ." More importantly, Congress broadly defined the scope of protected information as "reports, surveys, schedules, lists, *or data* compiled" in connection with Federal Rail and Safety Act (45 U.S.C. sections 421-447) and Federal Highway Safety Act (23 U.S.C. sections 101-160) programs. (Emphasis added). These federal safety programs include surveys and programs conducted by the states pursuant to federal highway and rail safety mandates. *See* 23 U.S.C. §§ 130(d), 152(a), 402(a); 45 U.S.C. § 433; 23 C.F.R. Parts 646, 924. Arizona participates in these programs and has specifically delegated rail crossing safety authority to the Corporation Commission. *See* A.R.S. §§ 40-337 to 337.03. The parties in this special action do not disagree that the information sought was related to a federal safety program.

The key to determining the scope of the section 406 privilege is Congress' decision to protect "data." The ordinary meaning of "data" is "facts." When the data has been "compiled," to use the statutory term, it is protected both against discovery and against admission into evidence.

The real parties in interest assert that "data" does not means facts or raw data, but only means the written documents into which the data has been incorporated. That contention contradicts the plain language used by Congress. As the real parties in interest conceded at oral argument, "We're not reading the statute as it's written."

Any other interpretation would render the statutory privilege illusory. Physical documents which contained data would be protected, but the data itself would not. Any other meaning would also undercut the statutory

purpose. Congress apparently intended to protect the process of making rail crossing safety decisions from outside scrutiny and interference.[2] With countless miles of rail lines and highways throughout the United States but only finite resources, improving safety is necessarily an ongoing process. Not every safety measure can be adopted at every rail crossing with a snap of the fingers. Congress thought that decisions seeking to optimize the proper balance between safety and fiscal restraints would be best produced in a system free from intrusive second-guessing by civil tort actions, a system in which candid evaluations of highway safety hazards would flourish and information-gathering would be uninhibited. *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (evaluations); *Perkins v. Ohio Dep't of Transp.*, 584 N.E.2d 794, 802 (Ohio Ct. App. 1989) (information); *Sawyer v. Illinois Cent. Gulf R.R. Co.*, 606 So.2d 1069, 1074 (Miss. 1992) (information).

The clear weight of authority holds that data as well as documents are protected by the statute. In *Robertson v. Union Pac.*, the court upheld the exclusion[3] of rail crossing safety data, of a newspaper article based on such data, and of expert opinion testimony based on such data. The court held that introduction of data compiled for the purpose of highway and rail crossing safety enhancement was barred by "[t]he plain language of the statute." 954 F.2d at 1435. Moreover, the statute also bars secondary sources—such as the newspaper article—because " '[t]o allow the introduction of the data through the newspaper article would circumvent the purpose of the

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[2] Although the legislative history of section 409 is silent as to Congressional purpose, the courts have ascribed this purpose to Congress. *See Harrison v. Burlington N. R.R. Co.*, 965 F.2d 155, 156 n. 3 (7th Cir. 1992).

[3] The evidence was excluded from trial. Discoverability of the information was not at issue because 23 U.S.C. § 409 apparently had not yet been amended to clarify that the data is also not discoverable.

statute.'" *Id.* (quoting district court). In short, both the documents containing data and the data itself are protected.

The superior court nevertheless rejected *Robertson* as authority because "it is not controlling on Ninth Circuit state trial courts." While *Robertson* is not "controlling" in a strict sense, it is powerfully persuasive. That decision is one of only two United States Court of Appeals decisions on point. The other decision is consistent with *Robertson*: It holds that a witness cannot testify about the contents of documents otherwise protected by the statute, because to allow such testimony "would have circumvented the purpose of the statute." *Harrison v. Burlington N. R.R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992).[4] It is of little consequence that these are decisions of the Seventh and Eighth Circuits of the Court of Appeals rather than of the Ninth Circuit. None of these courts has the power to directly review any decisions by Arizona state courts. Thus, none of them can issue "controlling" decisions, at least in the strict sense. No juridical reason warrants rejection of other circuits' opinion simply because the Ninth has not yet spoken.[5] Thus, we are left with two consistent opinions from the penultimate federal court in the land interpreting a federal statute. In our view, this comprises such weighty authority on a federal question that we would be extremely reluctant to disagree with it.[6]

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[4] The superior court did not cite *Harrison* and was apparently unaware of it.

[5] A different problem would be presented if the Ninth Circuit were to have issued an opinion contrary to other circuits. In such a situation, the weight of authority might conceivably be rejected in the interest of uniformity of law between state and federal courts within the circuit. However, the Ninth Circuit has not opined contrary to *Robertson* and *Harrison*.

[6] The superior court also relied on a district court opinion, *Hagerty v. Southern Ry. Co.*, 133 F.R.D. 34 (E.D. Mo. 1990). To the extent it conflicts with *Robertson*, *Hagerty* has been im-

State court decisions are largely consistent with the two federal appellate decisions: The states also interpret the federal privilege expansively. *In Perkins v. Ohio Dep't of Transportation*, for example, the court held that data —"evidence of any accidents which came to the attention of defendant solely as a result of its programs operated pursuant to a federal . . . program"—was inadmissible. 584 N.E.2d at 802. In *Sawyer v. Illinois Cent. Gulf R.R. Co.*, 606 So.2d at 1073, the court rejected as "specious" a "literalistic reading of the statute, to exclude the actual documents, but allow witnesses to testify to their contents." *See also Claspill v. Missouri Pacific R.R. Co.*, 793 S.W.2d 139 (Mo. 1990) (upholding exclusion of testimony, but not expressly interpreting scope of federal privilege statute).

A single state case, upon which the real parties in interest heavily rely, does not overcome the weight of federal and state authority. In *Martinolich v. Southern Pac. Transp. Co.*, 532 So.2d 435 (La. Ct. App. 1988), the court held that the language of the pre-amendment version of section 409 should be read narrowly as preventing only the admission of evidence at trial and not as barring the pretrial discovery of information. The Congressional amendment clarifying that the privilege indeed does bar discovery erased this misconception, and with it the vitality of *Martinolich*.

The real parties in interest nevertheless urge us to restrain the scope of the federal privilege and subject to discovery data developed after the Corporation Commission issued its order authorizing the improvement of this crossing. We find no authority for this proposition and, in view of the broad Congressional language, we are disinclined to restrict the privilege. Moreover, the Congressional purpose is best served by protecting such data.

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plicitly overruled: the federal district court that issued the *Hagerty* opinion is within the Eighth Ciircuit, and, unlike a state court, is subject to direct review by the circuit court of appeals.

As the real parties in interest acknowledged at oral argument, the Corporation Commission's order to improve this crossing did not designate when improvement was to begin: It stated that the improvement was to be made when the railroad had the available resources. Thus, decisions concerning the installation of the gates were not complete when the commission issued its order. Therefore, the release of information about this particular crossing compiled after the commission's order would still subject the decision making process to scrutiny. In addition, disclosure of information about other crossings generated after the commission issued its order would expose the process to the harsh glare of hindsight. Congress apparently intended to prevent precisely this kind of intrusion.

The real parties in interest also contend that the data is discoverable because it might have been gathered for purposes other than federal safety programs. The record fails to reveal that the data was gathered for other purposes. More importantly, that fact would be immaterial even if it could be proved: The federal statutory language and purpose would still require that the data be privileged. In *Robertson v. Union Pac.*, 954 F.2d at 1435 n.3, the court held just such an argument to be "without merit."

The real parties in interest next argue that the statute does not protect data produced prior to the effective date of the 1991 amendment. Prior to that date, they contend, the statute barred admission of the data into evidence at trial but not its pretrial discovery. *See Martinolich*, 532 So.2d at 439.

We reject this contention first because Congress intended all along to protect the data from discovery. The earlier version of the statute barred not only the admission of the data into evidence, but also its consideration "for other purposes." In our opinion, *Martinolich* misinterpreted the statute; the Congressional amendment clarified that the provision already extended the privilege to

discovery materials rather than altering the privilege by expanding its scope.

Secondly, even if the 1991 amendment extended the scope of the statute, the amendment was retroactive. Federal law considers procedural amendments such as this one to be presumptively retroactive. *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974). Thus, no matter when the data originated, the 1991 amendment barred its discovery at any time after the effective date of that amendment. *See Perkins v. Ohio Dep't of Transp.*, 584 N.E.2d at 803; *Claspill v. Missouri Pac. R. Co.*, 793 S.W.2d at 140 (23 U.S.C. section 409 is retroactive). There is no dispute that the 1991 version was in effect at the time the discovery requests were made in this case. Thus, the statute barred the requested discovery.

The final argument advanced by the real parties in interest is that application of the federal statute to state court actions violates the Tenth Amendment to the United States Constitution, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

The protection of the Tenth Amendment is limited to preserving the rights of the states to participate in the national political process; otherwise, the states must rely on that process to preserve their roles and powers. *South Carolina v. Baker*, 485 U.S. 505, 512 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). The enactment by Congress of a federal evidentiary and discovery privilege in state court actions for a permissible federal purpose does not deprive the State of Arizona of its ability to participate in the national political process and thus does not run afoul of the Tenth Amendment. *See Claspill v. Missouri Pac. R.R. Co.*, 793 S.W.2d at 140-41 (rejecting Tenth Amendment argument).

The respondent court and judge committed a clear abuse of discretion by failing to follow federal law and by directing the railroad to produce in discovery information that is protected by federal law. Accordingly, we have accepted jurisdiction and granted the relief sought by the railroad.

/s/ Jefferson L. Lankford
JEFFERSON L. LANKFORD
Judge

CONCURRING:

/s/ Edward C. Voss
EDWARD C. VOSS
Presiding Judge

/s/ Rudolph J. Gerber
RUDOLPH J. GERBER
Judge

APPENDIX F

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

December 3, 1992

HON. MICHAEL A. YARNELL

No. CV 91-19192

MARY ISBELL

v.

SOUTHERN PACIFIC TRANSPORTATION CO., *et al.*

MINUTE ENTRY

Defendant State's Motion for Protective Order and Plaintiff's Cross-Motion to Compel Discovery From Defendants have been under advisement.

On April 10, 1990 Richard Isbell was driving a milk truck westbound on Chandler Heights Road just east of Arizona Avenue. In crossing the railroad tracks at that location his truck was struck by a northbound Southern Pacific train. Mr. Isbell was killed in the accident.

Plaintiff asserts Defendants were negligent in several particulars, including:

1. Maintaining an unreasonably dangerous crossing;
2. Allowing an unreasonable delay in installing approved or ordered crossing control devices;

3. Failure to properly sign the crossing;

4. Failure of the train to properly slow down;

5. Inadequacy of warning horn and lights; and

6. Maintaining an obstructed view of the crossing.

Plaintiff seeks additional discovery from Southern Pacific concerning the reasons for, explanation of, an apparent four year delay after the State approved or ordered an upgrading in the crossing control devices. Plaintiff seeks additional discovery from the State concerning all other ordered crossing upgrades and delays state-wide in the relevant time period.

Plaintiff seeks discovery as to whether or not the State did or could have ordered Southern Pacific to upgrade the crossing. Finally, plaintiff seeks discovery concerning the construction of the upgraded crossing in this case, including the identity of the crews who did the work.

Defendants resist this discovery on the basis of 23 U.S.C. § 409 as amended December 18, 1991. That section is titled "Discovery and admission as evidence of certain reports and surveys" and reads as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The 1991 amendment changed this statute only by adding the words "Discovery and" to the title and the highlighted words "subject to discovery or" to the text.

Defendants contend that this statute prohibits disclosure of all of the information sought by Plaintiffs, even that which is otherwise public.[1] Plaintiff contends that the statute protects only reports, conclusions in reports, and the like, not any underlying data. Plaintiff also contends that protected reports are only those relating to this particular crossing, not any other crossing in Arizona.

In addition, Plaintiff contends that if the statute does prevent disclosure of the underlying facts sought, protection of the statute has been waived by defendants, the statute is unconstitutional, and the statute should be given only prospective application. As to these issues, based on the memoranda and this entire record, the Court concludes that no waiver as to any not yet disclosed material has occurred,[2] that the statute is constitutional, and that the statute is not limited to prospective application.

On the merits, this Court concludes that *only* those things not admissible under the prior statute are now not discoverable. If read as broadly as possible, the statute would exclude virtually any "data" collected by the State or the railroad that might be used on any current or future project that might be constructed for safety purposes and might use some federal money. Such a broad reading is not warranted by the case law, the common meaning of the words used, common sense, or apparent congressional intent.

After review of the cited cases, it is this Court's conclusion that while the actual "reports, surveys, schedules,

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[1] Defendants' contentions concerning federal preemption of some or all of Plaintiff's claims, while here raised by defendants, are not fully briefed and will not be dealt with by the court on this discovery motion.

[2] At least as to discovery, waiver has occurred as to all previously disclosed information.

lists, or data" compilations (or calculations) prepared expressly for "the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings" are neither discoverable nor admissible, simple factual information gathered for or contained in such reports or compilations is discoverable and is admissible *if* otherwise relevant and probative. *See Hagerty v. Southern Ry. Co.*, 133 F.R.D. 34 (E.D. Mo. 1990), *Martinolich v. Southern Pacific Trans. Co.*, 532 So.2d 435, 439 (La. App. 1 Cir. 1988). An otherwise discoverable or admissible fact is not made non-discoverable or non-admissible simply by its inclusion in a privileged document or conversation.[3]

In the context of this action Plaintiff may discover reasonably available factual information (as opposed to reports, opinions and conclusions excluded by the statute) concerning the specifics of the delay in upgrading the crossing at issue here and may discover reasonably available factual information (as opposed to reports, opinions and conclusions excluded by the statute) concerning other crossings during relevant periods. For the purposes of discovery in this action, the relevant period is from December 3, 1983 through the time the upgrade of the crossing at issue here was actually completed.

Should defendants have to expend more than minimal time to provide this information, Plaintiff must pay a reasonable hourly rate for all labor and copying involved.

IT IS ORDERED granting Plaintiff's Cross-motion to Compel Discovery From Defendants.

FURTHER ORDERED denying Defendant State's Motion for Protective Order.

FURTHER ORDERED Defendant State shall answer Plaintiff's Non-Uniform Interrogatories and respond to

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[3] To the extent *Robertson v. Union Pac. R. R. Co.*, 954 F.2d 1433 (8th Cir. 1992) holds otherwise, it is not controlling on Ninth Circuit state trial courts.

Plaintiff's Third Request For Production of Documents, except only as expressly limited by this minute entry, on or before *January 8, 1993.*

FURTHER ORDERED Defendant Southern Pacific shall provide answers to Plaintiff's Non-Uniform Interrogatories (First Set) together with Plaintiff's Non-Uniform Interrogatories (3rd Set) and respond to Plaintiff's Third Request For Production of Documents to Southern Pacific, except only as expressly limited by this minute entry, on or before *January 8, 1993.*

FURTHER ORDERED no award of attorneys' fees or costs concerning these discovery related motions is made.

FURTHER ORDERED setting a Continued Comprehensive Pretrial Conference for the purpose of considering the parties' Proposed Joint Pre-Trial Order and to set a firm trial date for *January 28, 1993 at 8:30 a.m.*

...TION FILED
AUG 25 1995

No. 95-134

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

MARY E. ISBELL, DENNIS ISBELL, JOHN ISBELL, MARSHA ISBELL, JOSEPH ISBELL, THE STATE OF ARIZONA, MARICOPA COUNTY, THE CITY OF CHANDLER, AND THE MARICOPA COUNTY SUPERIOR COURT,
Respondents.

On Petition For A Writ Of *Certiorari* To The Arizona Supreme Court

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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No. 95-134

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

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MARY E. ISBELL, DENNIS ISBELL, JOHN ISBELL, MARSHA ISBELL, JOSEPH ISBELL, THE STATE OF ARIZONA, MARICOPA COUNTY, THE CITY OF CHANDLER, and THE MARICOPA COUNTY SUPERIOR COURT

Respondents.

On Petition For A Writ Of *Certiorari*
To The Arizona Supreme Court

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2, the Association of American Railroads ("AAR") respectfully moves for permission to file the attached *amicus curiae* brief. Petitioner Southern Pacific Transportation Company and the Respondents State of Arizona, Maricopa County, and the City of Chandler have consented through their counsel to the filing of this brief; the Respondents Isbell have not. Correspondence concerning consent/non-consent has been lodged with the Clerk of this Court.

AAR is a voluntary, non-stock, nonprofit, incorporated trade association, whose members constitute the nation's major freight railroads. Amtrak, which carries virtually all intercity rail passenger traffic, is also a member of AAR. AAR member railroads operate trains on more than 150,000 miles of track, and most of the 170,000 rail-highway grade crossings in the United States. They have been active participants in the federal Grade Crossing Program since the enactment of the Federal Rail Safety Act of 1970 (FRSA)[1] and the adoption of the federal Grade Crossing Program.[2] AAR members thus have a vital interest in 23 U.S.C. § 409, since it is essential to the continued success of the federal Grade Crossing Program.

AAR seeks to file a brief *amicus curiae* only when a case poses an issue of great significance to the railroad industry nationwide. This is such a case, since it involves a construction of 23 U.S.C. § 409, a statute which impacts railroads at virtually every highway crossing over which they operate. Section 409 expressly prohibits discovery and admission into evidence in state and federal courts of all reports, surveys, schedules, lists or data compiled for the purpose, *inter alia*, of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadways, or railroad-highway crossings, pursuant to Sections 130, 144, and 152 of the Highway Safety Act, or for the purpose of developing any highway safety construction improvement project in any action for damages

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[1] 49 U.S.C. § 20101, *et seq.* (as amended, original version at 45 U.S.C. § 421, *et seq.*)

[2] The federal Grade Crossing Program emanates from the Highway Safety Act of 1973, Pub.L. No. 93-87, 87 Stat. 282, codified as amended 23 U.S.C. § 130.

arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The decision below, in order to avoid, in its words, *"... sacrific[ing Arizona's] tort scheme on the altar of the federal statutory scheme,"* fails to follow the federal circuit decisions and apply Section 409 according to its terms. Instead, it construes the statute so narrowly that it eviscerates the protection which the statute was designed to afford, and, from a practical standpoint, renders it a nullity.

23 U.S.C. § 409 was enacted to further the interest of highway safety by ensuring complete candor between state highway authorities and private parties such as railroads which share information with respect to hazards at rail-highway grade crossings. The resulting uninhibited and full disclosure of hazards, and the grade crossing improvement projects occasioned thereby, have made the Grade Crossing Program one of the most highly effective highway safety Programs ever enacted, according to the U.S. Department of Transportation. AAR members have played an active role in the success of the Program, and share with state agencies an interest in maintaining the free flow of state-railroad information, uninhibited by the threat of federally-mandated records being used against them in tort litigation.

Quite properly, the petition is limited to arguing the propriety of the holding below with respect to the documents in issue. Since AAR members operate in a number of states, and submit various types of information and documents in cooperating with a number of highway agencies, they have an interest in maintaining a uniform interpretation of Section 409. Similarly, they share with the states an interest in preventing a recurrence of the quandary which the statute was enacted to obviate: the conflict between fostering the

greater federal interest in preventing accidents on the highways, and facilitating tort litigation against them through the Grade Crossing Program or other Highway Act data they have generated.

Accordingly, AAR respectfully requests leave to present its views on the issues raised in this litigation.

Respectfully submitted,

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August 25, 1995

QUESTION PRESENTED

Whether materials compiled by a state highway department and a railroad in connection with a grade crossing improvement project fall within the proscription of 23 U.S.C. § 409, which prohibits discovery and admission into evidence in a Federal or State court proceeding all "reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadways, or railroad-highway crossings ... under Sections 130, 144 and 152 of [Title 23, United States Code (the Highway Safety Act)] or for the purpose of developing any highway safety construction development project which may be implemented using federal funds ...."

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Pub.L. 100-17, Title I, § 132(a),
101 Stat. 132 (A;r. 2, 1987); as
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Part A, § 1035(a), 105 Stat. 1978
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Federal Railroad Safety Act of 1970,
Pub. L. No. 91-548. 84 Stat. 971 (1970)
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of 45 U.S.C. § 431, *et seq.*), reenacted
in Act of July 5, 1994, Pub. L. No. 103-272,
§ 1(e), 108 Stat. 863 (now codified at
sections of 49 U.S.C. § 20101, *et seq.*) 2

OTHER AUTHORITIES:

Brief Of The United States As Amicus Curiae in No. 90-1412 (October Term, 1991), *State of Alabama Highway Department v. Boone*, 572 So.2d 389 (Ala. 1990), *Cert. denied*, 112 S.Ct. 370 (1971) 6, 7

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No. 95-134

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SOUTHERN PACIFIC TRANSPORTATION COMPANY,
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Respondents.

On Petition For A Writ Of *Certiorari*
To The Arizona Supreme Court

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is a voluntary, non-stock, nonprofit, incorporated trade association. Its members constitute the nation's major freight railroads, operating approximately 76 per cent of the total line-haul mileage, and producing some 94 per cent of freight revenues. Amtrak, which carries virtually all intercity rail passenger traffic, is also a member of AAR.

AAR represents its members before courts, agencies and Congress on matters of concern to the railroad industry.

Safety at rail-highway grade crossings is a vital concern of AAR and its members, who operate trains over 150,000 miles of track, and most of the 170,000 rail-highway grade crossings in the United States. Since the enactment of the Federal Rail Safety Act of 1970 and the adoption of the federal Grade Crossing Program,[1] AAR members have actively participated in that program, which has proven to be "one of the most successful highway safety measures ever enacted."[2] Essential to the continued success of the Program is 23 U.S.C. § 409, which is designed to insure candor and the integrity of materials compiled to enhance safety at rail-highway grade crossings. Under that statute, those items cannot be discovered or admitted in evidence in federal or state courts.

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[1] 49 U.S.C. § 20101, *et seq.* (as amended, original version at 45 U.S.C. § 421, *et seq.*) (FRSA). The federal Grade Crossing Program emanated from the Highway Safety Act of 1973, Pub.L. No. 93-87, 87 Stat. 282, codified as amended 23 U.S.C. § 130. The Secretary of Transportation's role under FRSA and the Highway Safety Act is implemented through the Federal Railroad Administration (FRA) and the Federal Highway Administration (FHWA).

[2] "The federal Grade Crossing Program has been one of the most successful highway safety programs ever enacted, reducing fatal and non-fatal accident rates by 88% and 62%, respectively, and saving more than 6,400 lives and preventing more than 26,500 ... injuries." Report of the Secretary of Transportation to the United States Congress, *The 1991 Annual Report on Highway Safety Improvement Programs* (April 1991), at IV-5. This dramatic reduction in accidents has continued. USDOT estimates that more than 7,200 fatalities and 31,000 nonfatal injuries have been prevented. Report of the Secretary of Transportation to the United States Congress, *The 1993 Annual Report on Highway Safety Improvement Programs* (April 1993), at IV-5.

SUMMARY OF ARGUMENT

There are special and important reasons why this case should be reviewed by this Court. Section 409 applies to state and federal courts. In order for this statute to achieve its purpose, it is essential that it be interpreted uniformly. The state court in this case has strayed from the principle of uniformity, and is out of step with the federal circuits.

As noted in the Petition, previous decisions of the federal courts of appeal and most state appellate courts have applied the statute literally, and correctly.[3] However, the decision below rejects the statute's plain language and holds it inapplicable on narrow grounds for which there is no legal basis. The decision below represents a state challenge to the superior federal interest embodied in the statute, that of ensuring integrity in the information-gathering and decision-making processes.

Thus, this case involves an important question of federal law which has not been, but should be settled by this Court under the criteria governing review on *certiorari* under U.S. Supreme Court Rule 10.1(c). At the very least, the decision below demonstrates a clear conflict with prior

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[3] One other state court has deviated from the plain language of the statute and reached incongruous results. Although Section 409 expressly covers "data" without limitation, and "data" is usually defined as "facts," *Wiedeman v. Dixie Electric Membership Corp.*, 606 So.2d 1069 (La. 1993), *Cert. denied* 114 S.Ct. 2134 (1994) holds that "data" is divisible into constituent sub-parts, and that "raw data" is not covered by the statute. As a consequence of the *Wiedeman* decision, there is now pending in this Court a Petition for a Writ of *Certiorari* from a Louisiana state court "raw data" ruling against its state highway agency in *The State Of Louisiana Through The Department Of Transportation And Development, et al. v. Poole, et al.*, No. 95-172 October Term, 1995.

decisions of United States courts of appeals and other state courts of last resort on a federal question,[4] so as amply to satisfy the criteria in Rule 10.1(b).

ARGUMENT

I. THE DECISION BELOW VIOLATES FEDERAL SUPREMACY

The Court below openly acknowledges the primary motivation behind its strained reading of Section 409 -- to avoid the doctrine of Federal Supremacy. First, the Arizona Supreme Court admits that "[i]f we look only to words, we agree ... that [23 U.S.C. § 409] immunizes from discovery and admissibility the documents prepared in connection with the relevant federal safety program." (Pet.App., at 5a). It then ignores the clear mandate of the statute and holds that the statute **does not apply** to ***some*** reports and data, *i.e.*, those which are within the knowledge of a party, derived from sources other than a protected document.

The Arizona Supreme Court did not veil its motivation: compensating injured parties under Arizona's tort scheme:

> * * * [a literal reading of Section 409] would prevent [plaintiffs] from proving claims that could otherwise have been proven had there been no safety enhancement project. * * *

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[4] The conflict between the decision below and decisions by federal circuits and state courts are adequately discussed in the Petition filed herein, and will not be repeated here.

> But state damage claims can only be proved with facts. * * * *[T]he breadth of exemption* argued by Southern Pacific and the state, and *acknowledged by the court of appeals, would sacrifice the state tort scheme on the altar of the federal statutory scheme.*

(Pet.App., at 5a-6a). (Emphasis added.) This unabashed effort to ignore a clear policy choice made by Congress in defiance of federal supremacy is not shared by other state courts, which have recognized that 23 U.S.C. § 409 must prevail over state law by virtue of the Supremacy Clause.[5] Indeed, Arizona's intermediate Court of Appeals followed the leading federal case authority, acknowledging that Federal Supremacy governed its construction of Section 409:

> The disposition of this dispute is determined by the federal statue. Although the plaintiffs have made a state law wrongful death claim, the federal statute overrides Arizona's discovery rules by virtue of the Supremacy Clause. U.S. Const. art. VI, cl. 2. We are bound to follow the federal statute.

(Pet.App., at 22a.)

AAR's members, which operate throughout the contiguous states, would be particularly prejudiced if Section 409 were to be subjected to varied interpretations. The Arizona Supreme Court's attempt to end-run the Supremacy

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[5] *See, e.g., Sawyer v. Illinois Central Gulf R. Co.*, 606 So.2d 1069, 73-74 (Miss. 1992); *Wiedeman v. Dixie Electric Membership Corp., supra*; and *Claspill v. Missouri Pacific R. Co.*, 793 S.W.2d 139, 140-41 (Mo. 1990), *Cert. denied*, 111 S.Ct. 517 (1990).

Clause by its strained construction of Section 409 is, without more, ample reason for the exercise of this Court's *certiorari* jurisdiction.

II. BY ESCHEWING THE PLAIN LANGUAGE OF SECTION 409, THE DECISION BELOW JEOPARDIZES HIGHWAY SAFETY

The result reached below jeopardizes the basic purpose of Section 409, which was enacted to ensure that complete and accurate data would be compiled for decision-making purposes directly affecting highway safety. This was brought to this Court's attention in connection with the Petition for a Writ of *Certiorari* in *State of Alabama Highway Department v. Boone*, 572 So.2d 389 (Ala. 1990), *Cert. denied*, 112 S.Ct. 370 (1971),[6] wherein the United States, at the request of this Court (111 S.Ct. 1679 (1991)), explained the critical importance of Section 409:

> If reports and data concerning potential highway safety hazards are subject to discovery in tort actions, State and private parties will likely be deterred from compiling complete and accurate information about such hazards. As a result, federal highway safety programs -- which depend on information about safety problems supplied by the States and private entities such as railroads -- will be jeopardized.

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[6] Following the denial of the Petition for a writ of *certiorari* in *Boone*, Congress amended Section 409 in late 1991, by including an express prohibition against *discovery* of the enumerated materials.

Brief Of The United States As Amicus Curiae, No. 90-1412 (October Term, 1991), at p. 6. The United States also traced the history and motivation behind Section 409:

> The forerunner of Section 409 was a 1986 DOT recommendation that Congress amend Title 23 to provide that documents or data compiled in connection with federal highway safety programs "shall not be required to be made available pursuant to section 552 of title 5, United States Code, nor shall they be admitted into evidence, or considered for other purposes, in any action for damages mentioned or addressed in such [documents] or data." DOT Draft Bill, *Surface Transportation Reauthorization Act of 1986*, §5 (Feb. 5, 1986). The DOT's 1986 proposal, in turn, was based on similar DOT proposals prompted by concern that "highway departments are reluctant to [identify and prioritize roadway hazards] for fear that acknowledging the existence of hazardous conditions would expose them to liability. Memorandum from Marshall Jacks, Jr., Associate Administrator for Traffic Safety, Traffic Engineering, and Motor Carriers to D.L. Ivers, Chief Counsel, Federal Highway Administration (May 4, 1983). * * *

Id., at pp. 9-10.[7] By its holding that "the statute does not

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[7] Two federal circuits have described Section 409 as having dual purposes: (1) to facilitate administrative candor; and (2) to prohibit use of federally-required records as a tool in private litigation. *Harrison v.*

(continued...)

purport to protect facts within the personal knowledge of a party" (App. 5a), the decision below eviscerates Section 409 by allowing railroad-generated facts to be obtained from the railroad, and state-generated facts to be obtained from the state -- *i.e.*, ***all facts*** are thereby obtainable and available for use in litigation, thereby rendering Section 409 a nullity.

At the outset of the Grade Crossing Program, railroads faced a quandary. Cooperating fully with requests made by states as to additional grade crossing information, and collaborating with the states on their contemplated improvement projects, gave rise to tort liability considerations. Of particular concern was the ability of tort litigants to secure this evidence through discovery, and use it at trial. The states were faced with the same problem. The quandary was solved for both by the enactment of 23 U.S.C. § 409.

If state courts are left to construe Section 409 so as to promote interests unrelated to the statute's purpose, railroads and state agencies will again be faced with their former quandary. Each will be forced to make difficult choices which the statute was designed to obviate. Since a state agency must appear only in courts in its state, whereas railroads are subject to different court systems in each of the jurisdictions in which they operate,[8] railroads will bear the brunt of incorrect interpretations of Section 409.

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[7](...continued)
Burlington Northern R. Co., 965 F.2d 155, 160 (7th Cir. 1992); and *Robertson v. Union Pacific R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992).

[8] One AAR member (the Burlington Northern Railroad Company) operates in twenty-three (23) states.

Thus, the decision below jeopardizes the concerns underlying the enactment of Section 409 -- namely to remove all restraints that might inhibit state transportation departments and railroads from gathering and exchanging complete and accurate data necessary for making decisions directly affecting the public safety.

CONCLUSION

On the basis of the foregoing, *amicus curiae* Association of American Railroads respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Arizona Supreme Court in this case should be granted.

Respectfully submitted,

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No. 95-134

In The

Supreme Court of the United States

October Term, 1995

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

vs.

MARY E. ISBELL, DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL, JOSEPH ISBELL, THE STATE OF ARIZONA, MARICOPA COUNTY, THE CITY OF CHANDLER and THE MARICOPA COUNTY SUPERIOR COURT,

Respondents.

On Petition for Writ of Certiorari to the Arizona Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENTS MARY E. ISBELL, DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL AND JOSEPH ISBELL

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QUESTIONS PRESENTED

At issue is the interpretation of 23 U.S.C. § 409, which provides (with emphasis added):

> **§ 409. Discovery and admission as evidence of certain reports and surveys.**
>
> Notwithstanding any other provision of law, **reports, surveys, schedules, lists or data** ***compiled for the purpose of identifying, evaluating, or planning*** the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or ***for the purpose of developing*** any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.

1. Does this Statute shield operative facts concerning railroad crossings simply because such facts are later incorporated into "reports, surveys, schedules, lists or data compiled" for purposes mentioned in the Statute?

2. Where the State or Railroad is obligated by statute or common law to prepare compilations of data independent of federal funding projects, are such compilations of data exempt

from discovery and admission in evidence because they may also be used to obtain federal funding?

3. Are compilations of data generated *after* a grade crossing has been "identified" or "evaluated" and upgrades "planned" or "developed" protected by the Statute?

4, Does 23 U.S.C. § 409 prohibit the discovery of facts concerning the grade crossing review process (*e.g.*, that such a process exists, the dates on which crossings were reviewed, the names of the persons present at such reviews, etc.)?

5. Where a law enforcement officer or other person gives notice to the State or Railroad of a hazardous condition at a grade crossing, is such notice shielded from discovery or admision into evidence by 23 U.S.C. § 409?

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APPENDIX

Appendix A — Excerpts of Discovery Requests at Issue . 1a

COUNTER-STATEMENT OF THE CASE

A. Factual and Procedural Overview

Richard Isbell was killed on April 10, 1990 when the tractor trailer he was driving collided with a Southern Pacific train at the Chandler Heights grade crossing in Chandler, Arizona. The grade crossing at which the collision occurred had been placed by the State on an array for safety improvement by the installation of automatic gates in 1983. In 1985, Maricopa County petitioned the Arizona Corporation Commission for authority to install the gates. That authority was granted "in the interest of public necessity" in January, 1986. Four years later, the automatic gates were still not installed and Mr. Isbell was killed at the crossing.

Mr. Isbell's widow and children brought suit against Southern Pacific ("Railroad"), the State of Arizona ("State"), Maricopa County and the City of Chandler, alleging that their joint and separate negligence contributed to Mr. Isbell's death. Early in the litigation, the Isbells sought to depose a State employee and served certain written interrogatories upon the State and Railroad.[1] Relying upon 23 U.S.C. § 409, the State refused to allow its employee to answer substantive questions at deposition and both the State and Railroad refused to respond to the interrogatories.

The State moved for a protective order and the Isbells cross-moved the trial court to compel discovery. The trial court granted the motion to compel. The State and Railroad then filed a Petition for Special Action.[2] The Arizona Court of Appeals granted

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1. For the Court's convenience, the discovery requests at issue are appended hereto as Appendix 1.

2. In Arizona, interlocutory relief is obtained through "special action" which has replaced writs of certiorari, mandamus and prohibition. Ariz. R. P. Spec. Act. 1.

jurisdiction and reversed the trial court. The Isbells then petitioned the Arizona Supreme Court for review. The Arizona Supreme Court granted review, vacated the decision of the intermediate appellate court, affirmed the trial court ruling, and remanded the case to the trial court for further proceedings.[3]

B. The Railroad's Position

The Railroad reads 23 U.S.C. § 409 as shielding from discovery "all information" and "all facts" in any way related to a grade crossing that could be improved. This reading would bar the discovery or admission of the prior accident history of the grade crossing and prevent the jury from knowing whether there had been one similar accident before Mr. Isbell's death or twenty, thereby precluding the jury from evaluating the nature and extent of the dangerousness of this grade crossing.

Similarly, under the Railroad's interpretation of the Statute, even the police report and other investigation of the very incident in question would be undiscoverable and inadmissible because that collision played a role in the ultimate upgrade of the crossing (within months of Mr. Isbell's death) and could play a role in determining whether future upgrades were necessary at this crossing or others. In the same manner, testimony by the Railroad and governmental investigators—who were at the scene shortly after the crash, interviewing the witnesses, taking measurements and photographs—would be prohibited. The same interpretation of 23 U.S.C. § 409 would also preclude the discovery and admission of even eyewitness testimony because their observations could find their way into reports and surveys of

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3. Throughout the litigation in the State courts, the Isbells raised the issue of whether 23 U.S.C. § 409 applies to entities other than the states. The Isbells also questioned whether documents relating to crossings *other than* the precise crossing at which Mr. Isbell was killed were within the ambit of 23 U.S.C. § 409. The Arizona Supreme Court did not reach these issues.

railroad crossings which could be used to identify, evaluate or plan a grade crossing improvement.

While such absurd results would flow naturally from the Railroad's interpretation of 23 U.S.C. § 409, they do not flow from the actual text of 23 U.S.C. § 409 or from the interpretation of the Statute by the Arizona Supreme Court.

C. The Arizona Supreme Court's Decision

The Arizona Supreme Court rejected the Railroad's broad interpretation of the Statute. The court held that 23 U.S.C. § 409 creates an evidentiary privilege and that certain classes of data compilations are exempt from discovery and admission at trial. The Arizona Supreme Court's interpretation is in line with traditional canons of statutory interpretation which teach that evidentiary privileges are to be construed narrowly to foster the truth-seeking mission of the judicial system.

The Arizona Court did not apply its interpretation of 23 U.S.C. § 409 to the actual interrogatories at issue. The court wrote:

> We . . . reject a broad interpretation of 23 U.S.C. § 409 and agree with the view of those courts giving § 409 its plain meaning. It follows, therefore, that the trial judge did not err in denying the state's motion for protective order and granting Isbell's cross-motion for order compelling discovery from the state and from Southern Pacific. *The record here is insufficient for us to apply our understanding of this statute to the specific material which were the subject of the motions.* We therefore vacate the opinion of

> the court of appeals, affirm the order of the trial court, and remand for further proceedings consistent with this opinion.

890 P.2d at 615 (emphasis added).

As of this date, the Railroad has yet to respond to the outstanding discovery requests. Depositions of relevant witnesses have not yet been set. Further discovery requests are anticipated. Petitioner (and the State) possess many types of documentary evidence which may or may not be held discoverable or admissible under the Arizona Supreme Court's interpretation of 23 U.S.C. § 409. Much discovery remains to be done before the trial of this matter and before an actual determination is made of the scope of the documents, facts and witness testimony that would be admissible at trial.

D. The Isbells' position

The following hypothetical[4] will illustrate the issues raised by the Statute: in order to obtain federal funding, a state department of transportation ("DOT") conducts a field review of the Chandler Heights crossing. At that review, state employees take various measurements relating to the crossing and reach various conclusions regarding the crossing's safety. After the review, the state employee prepares a report, containing both factual findings and opinions. Later, in determining whether the Chandler Heights crossing should be upgraded, the DOT reviews the following documents: (1) the field review, (2) accident reports relating to the crossing prepared by city police departments, and (3) a letter from a concerned citizen

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4. A hypothetical example is necessary because the Arizona Supreme Court decision is interlocutory. The actual scope of the discovery to be allowed is as yet undecided.

complaining that the crossing is dangerous. Based upon that review, the DOT determines that the crossing should be upgraded and orders the railroad to upgrade the crossing.

Four years after the state determines that the public would be served by the upgrade, the crossing is still not improved. A man is killed when his tractor trailer hits the side of a train at the Chandler Heights crossing. During the litigation, the plaintiffs propound discovery to which the state and railroad object. The question is presented: what did Congress intend to shield from discovery when it passed 23 U.S.C. § 409?

The Arizona Supreme Court held, and the Plaintiffs concede, that the completed field review form is not discoverable under 23 U.S.C. § 409. A fair reading of the Arizona Supreme Court decision is that the following types of information and/or documents are not shielded by 23 U.S.C. § 409: (1) underlying facts found in the field review report, such as the measurements relating to the crossing, (2) police reports and other such documents regarding the accident history of the crossing generated by state agencies and others under an independent duty to do so, and (3) information received from concerned citizens or law enforcement personnel. The Arizona Supreme Court decision also implies that information generated *after* the decision to upgrade has been made are not protected. Similarly, it appears that operational facts concerning the process are not protected; *i.e.*, the jury could be told that the state and railroad does review grade crossings for purposes of safety enhancement. The Arizona decision does not reach the issue of whether information concerning crossings other than the crossing at issue in the collision is protected.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS INTERLOCUTORY.

Because the parties are in the middle of discovery and the trial of this matter is yet many months away, it is too early to determine just which documents, facts and witnesses will be affected by the Arizona decision. Absent specific rulings on the discoverability or admissibility of particular evidence, this Court's review would be premature.

II.

THE RECORD IS INSUFFICIENT FOR REVIEW.

As noted above, the Arizona Supreme Court did not examine the specific discovery requests and did not rule on each request individually. The Arizona decision has yet to be applied to the facts of this case.

III.

THE ISSUES ARE NOT FULLY DEVELOPED BY THE APPLICABLE CASE LAW.

Only two Circuit Courts have construed 23 U.S.C. § 409, as amended in 1991: the Seventh Circuit in *Harrison v. Burlington Northern R.R. Co.*, 965 F.2d 155 (7th Cir. 1992), and the Eighth Circuit in *Lusby v. Union Pacific Railroad Co.*, 4 F.3d 639 (8th Cir. 1993) and *Robertson v. Union Pac. R.R.*, 954 F.2d 1433 (8th Cir. 1992). Each of these decisions is narrowly limited to the facts of the particular case.

The plaintiff in *Harrison* conceded that the document at

issue — a report prepared by a state agency following the crash and detailing the need to upgrade the crossing — constituted "data compiled for the purpose of identifying . . . the safety enhancement" of the crossing. 965 F.2d at 159. The plaintiff in *Harrison* waived her argument that the authors of the report should be allowed to testify "for purposes other than describing the results of the investigation." 965 F.2d at 160, n. 9.

At issue in *Robertson* was the admissibility of a "hazardousness formula"[5] and traffic counts of the subject crossing. Both the formula and the traffic count "were compiled and utilized by the [state agency] pursuant to 23 U.S.C. § 130(d) for purposes of monitoring and improving highway railroad safety." 954 F.2d at 1435. The Eighth Circuit found that the formula, the count and a newspaper article based on the formula were inadmissible. Without analysis, the *Robertson* court rejected the plaintiff's argument that some of the evidence should be admissible because it was not collected or utilized solely for federal funding projects. The whole of the court's reasoning is contained in a footnoted sentence: "Although such information was available for other uses and purposes, the statute's mandatory language requires exclusion of such evidence at trial." 954 F.2d at 1435, n. 3.

Citing *Robertson, Lusby* precluded the admission of the state highway department's "records of vehicle count, train traffic, and earlier accidents at the crossing" and the admission of expert testimony that was based *exclusively* on such documents. 4 F.3d at 641. The court noted that these documents were used by the highway department "to comply with the federal program under § 130(d)." Relying on *Robertson,* and with a similar dearth of analysis, the *Lusby* court held that materials "do not fall outside

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5. Under this formula, the crossing at issue in *Robertson* had been identified as the most hazardous in the State of Texas. That finding was later repeated in a newspaper article.

the scope of § 409 merely because they are not compiled solely for federal reporting purposes and are available for other purposes." 4 F.3d. at 641.[6]

This Court should deny certiorari to allow the Circuit Courts to apply 23 U.S.C. § 409 to testimony and documents other than those which the parties concede fall within the letter of the statute.

IV.

THIS CASE IS DISTINGUISHABLE FROM THE AUTHORITY CITED BY PETITIONER.

Unlike the foregoing cases, the evidence at issue in this case does not fall neatly within the narrow confines of 23 U.S.C. § 409, nor have the Plaintiffs waived any of their arguments. The Plaintiffs seek to discover:

> (1) compilations of data generated *after* a grade crossing has been "identified" or "evaluated" and upgrades "planned";
>
> (2) underlying facts concerning the grade crossing review process (*e.g.*, that such a process exists, the dates on which crossings were reviewed, the names of the persons present at such reviews);

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6. Interestingly, the *Lusby* court left the door open on this issue by writing the following: "Although the expert might have been able to generate similar data himself, he nevertheless impermissibly based his opinion on [highwayt department] data." 4 F.3d at 641, internal citation omitted. Had the expert compiled the data himself or received a report from a governmental agency other than the highway departrment, the use of such a compilation would be permissible.

(3) notices given by a law enforcement officer or other person of a hazardous condition at a grade crossing, where such person is not obligated to give such notice pursuant to any statute or regulation connected with the federal funding scheme;

(4) factual observations made by persons involved in the review process (without inquiry as to any opinions or conclusions reached by such persons); and

(5) compilations of data generated by the State, Railroad and others pursuant to statutory or common law obligations *independent* of the federal funding scheme (*e.g.*, police reports).

There is no conflict between the Arizona decision and the Seventh Circuit's decision in *Harrison*.

The only potential conflict between the Arizona decision and the Eighth Circuit's decisions concerns the admission of police reports and other such documents; but even that potential conflict is not fully developed by the case law. Neither *Lusby* nor *Robertson* actually analyzes this issue; it was instead dealt with in a footnote.

It would be premature to grant certiorari in this case because there is no developed conflict between the Circuit Courts and the Arizona decision and the Circuit Courts have not yet analyzed these issues in detail.

V.

THE ARIZONA SUPREME COURT'S DECISION IS CORRECT.

Since "the [legislative] history of 23 U.S.C. § 409 is nonexistent," the language of the statute is of paramount importance.[7] A diagram of the Statute shows that it shields from discovery:

1. reports, surveys, schedules, lists or data

2. compiled for the purpose of

    a. identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of [Title 23] or

    b. developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

To be undiscoverable, the evidence at issue must meet both requirements.[8]

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7. 890 P.2d at 611, accord *Harrison*, 965 F.2d at 156, n. 3 ("The legislative history of § 409 is silent as to why Congress determined that such data should be inadmissible in judicial proceedings.").

8. The statute also requires that, to be protected, the data compilations must relate to the "occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data." The Arizona Supreme Court did not reach this issue.

A. "Reports, surveys, schedules, lists or data" are terms of art meaning something different than raw "facts."

Congress specified that "reports, surveys, schedules, lists or data" are protected. "This enumeration suggests something more than simple factual information that [a state department of transportation] has gathered." *Martinolich v. Southern Pacific Transp. Co.*, 532 So. 2d 435, 439 (La. App. 1 Cir. 1988).

In determining congressional intent, the Arizona Supreme Court referred to other sections of Title 23, especially those sections referenced in § 409. The court concluded that the words "reports, surveys, schedules, lists or data" are terms of art which refer to more than raw "facts."

The Railroad rejects that analysis and contends that the phrase "reports, surveys, schedules, lists or data compiled" should be equated with the word "fact." That argument fails because not even the word "data" is strictly synonymous with "fact."[9] Stated simply, a fact *is*, while data is gathered or *compiled*. This difference, while subtle, is important. That there

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9. *Webster's Ninth Collegiate Dictionary* defines the terms as follows:

> **data**: factual information (as measurements or statistics) used as a basis for reasoning, discussion or calculation <the [data] is plentiful and easily available — H.A. Gleason, Jr.> <comprehensive [data] on economic growth has been published — N.H. Jacoby>
>
> **fact**: 1: a thing done: as **a**: CRIME <accessory after the [fact]> **b** *obs*: FEAT **c** *archaic*: ACTION 2 *archaic*: PERFORMANCE, DOING 3: the quality of being actual: ACTUALITY <a question of [fact] hinges on evidence> 4 **a**: something that has actual existence <space travel is now a [fact]> **b**: an actual occurrence: EVENT <prove the [fact] of damage> 5: a piece of information presented as having objective reality — **in fact**: in truth: ACTUALLY

is a railroad crossing at Chandler Heights Boulevard is a "fact." An array that lists the Chandler Heights Boulevard crossing as one of several crossings for improvement is "data" compiled for purposes of obtaining federal funding.

B. Only data "compiled" for the specific purposes listed in 23 U.S.C. § 409 are exempt from discovery and admission.

To claim the privilege under 23 U.S.C. § 409, the State or Railroad must prove that the contested evidence consists of "reports, surveys, schedules, lists or data *compiled*" for a protected purpose. If the subject evidence is a compilation of data generated pursuant to 23 U.S.C. §§ 130, 144 or 152, the defendant would meet its burden. If the State or Railroad cannot show that the evidence was compiled pursuant to §§ 130, 144 or 152, the evidence *may* still be protected, but only if the State or Railroad could prove that the evidence was compiled for purposes of developing a safety program using federal funding other than under §§ 130, 144 or 152.

If the document was compiled for another purpose (as in the obvious case of police reports) and later incorporated into data compiled for protected purposes, that document is not protected by the Statute. The State and Railroad cannot shield potentially damaging reports of other agencies by the simple expedient of "compiling" them or attaching them to reports concerning highway or railroad crossing safety.

The Railroad argues against this common sense interpretation of the term "compiled" as it is used in 23 U.S.C. § 409. The Railroad's reliance on *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989) in support of its argument is misplaced because the statutes and facts in the two cases are materially different. *John Doe Agency* involved a Freedom of Information Act ("FOIA") request by a defense contractor which

was under investigation by law enforcement personnel. The contractor sought access to government documents that had been generated by an Agency before the investigation. The Agency denied the request based on the exception to the FOIA for documents "compiled for law enforcement purposes" and transferred the documents to the FBI. 493 U.S. at 149.

This Court held that the Agency documents, even though not "originally" compiled for law enforcement purposes, were entitled to protection because they were later "recompiled" for law enforcement purposes.[10] Implicitly underpinning the decision is the fact that the documents at issue had been physically removed from the Agency premises and were no longer available other than in their recompiled state at the FBI for law enforcement purposes.

The instant case is different from *John Doe Agency.* First, the FOIA request at issue in *John Doe Agency* concerned only *documents,* not underlying facts.[11] That distinction alone is dispositive.

Moreover, the nature and treatment of the documents in *John Doe Agency* and in this case is materially different. In *John Doe Agency,* once the documents were "recompiled," they were taken from the original agency and removed from public record. In this case, the documents at issue were, and remain, public records. To the extent that records of other agencies were gathered and "recompiled" into the files of the Arizona Corporation Commission, they were copied, not removed from the originating

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10. For purposes of the Opinion, this Court assumed that the documents had, in fact, been "recompiled" by law enforcement personnel *before* the FOIA request.

11. Presumably such facts would be subject to disclosure under the various rules governing criminal trials.

agency (from which they remain available). This distinction is important. In *John Doe Agency,* the original documents were removed from the Agency and "recompiled for law enforcement purposes" by the FBI and were shielded from all public access. By contrast, in this case, when the Arizona Corporation Commission made a copy of a police report and made that copy part of a compilation of documentation used to evaluate the safety of a grade crossing, the original police report remained available to the public and the Plaintiffs.

Finally, the purpose behind the protection afforded by the exception to the FOIA for documents "compiled for law enforcement purposes" is different from the purpose underlying 23 U.S.C. § 409. In the FOIA context, the documents are protected because disclosure would impact *criminal* enforcement, i.e., "could reasonably be expected to interfere with enforcement proceedings" or "would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(A) and (E). While 23 U.S.C. § 409 does not contain a statement of purpose, it is usually assumed that it was enacted to encourage candor which would facilitate more rapid improvements to highways and grade crossings. Given these different purposes, the term "compiled for law enforcement purposes" as used in 5 U.S.C. § 552(b)(7) is interpreted more broadly than the term "compiled for safety enhancement purposes" in 23 U.S.C. § 409.

C. The Statute does not prohibit the discovery of data compiled after the Arizona Corporation Commission has entered its order that a grade crossing be improved.

23 U.S.C. § 409 may be analogized to the "deliberative process privilege." The purpose behind the two privileges is to assure candor within an administrative agency in reaching its policy decisions. *See Concrete Const. Co. v. U.S. Dept. of Labor,*

748 F. Supp. 562, 567 (S.D. Ohio 1990) and *Nadler v. U.S. Dept. of Justice,* 955 F.2d 1479 (11th Cir. 1992). These purposes are served only if the privilege is limited to documents which are: (1) "pre-decisional," those which are "generated *before* the adoption of an agency policy," and (2) "deliberative," those which "reflect[ ] the give-and-take of the consultative process." *Concrete Const.,* 748 F. Supp. at 566; *Nadler,* 955 F.2d at 1491 (internal citation omitted). In addition, "purely factual material that does not reflect the agency's deliberative process generally is not protected." *Nadler,* 955 F.2d at 1491 (internal citation omitted).

Congress explicitly limited 23 U.S.C. § 409 to those reports (and other documents) generated *before* the decision to upgrade a crossing was made, thereby fostering administrative candor without cloaking the government's or railroad's post-decisional conduct in an impenetrable veil of secrecy or immunity for unsafe conduct.

For these reasons, all material (whether it be "reports, surveys, schedules, lists or data"), and certainly any underlying facts relating to a grade-crossing that are compiled *after* the decision has been made to upgrade the crossing, should be freely discoverable.

CONCLUSION

Certiorari should be denied. There is no real conflict between the Arizona decision and the decisions of the only two Circuit Courts that have addressed this Statute. Moreover, the Arizona decision is interlocutory and does not even address the actual discovery requests. The trial court has not yet ruled on the discoverability or admissibility of the testimony and documents at issue. An interpretation of the scope of 23 U.S.C. § 409 as it applies to the facts in this case is consequently unnecessary and premature.

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September 25, 1995

APPENDIX A — EXCERPTS OF DISCOVERY REQUESTS AT ISSUE[1]

* * *

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

NO. CV 91-19192

NON-UNIFORM INTERROGATORIES
(First Set)

AND ANSWERS

TO: Defendant Southern Pacific Transportation Company

Under authority of Rule 33, Arizona Rules of Civil Procedure, the plaintiff(s) hereby request(s) that the defendant Southern Pacific Transportation Company answer in writing and under oath, within forty-five (45) days from the receipt hereof, the following interrogatories

INSTRUCTIONS FOR USE IN ANSWERING INTERROGATORIES

A. All information is to be divulged which is in the possession, custody or control of each individual or corporate party, their attorneys, investigators, agents, employees or other representatives, including all information reasonably available to them.

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1. For brevity's sake, the captions and mailing lists will not be reproduced. The interrogatories and answers (where given) will be reproduced. Answers will be italicized.

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668. State the maximum speed limit for freight trains at this crossing allowed on April 10, 1990 by:

a. Maricopa County.

Not applicable.

b. City of Chandler.

Not applicable.

c. State of Arizona.

Not applicable.

d. Federal Government.

Not applicable.

669. State the maximum speed limit for trains at this crossing allowed by Southern Pacific on April 10, 1990.

25 miles per hour.

670. State the date that this grade crossing first appeared on the Arizona Corporation Commission's Array for safety improvement by the installation of gates.

Objection. Privileged under 28 U.S.C. § 409 and not relevant to the subject matter of the pending action or reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Southern Pacific Transportation Company does not independently maintain copies of previous crossing arrays.

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Plaintiff can and should obtain this information from the Arizona Corporation Commission.

671. Was there ever a field review at this grade crossing? ____ If so, state:

Please refer to answer and objection to interrogatory number 670.

a. Each date on which it was held.

b. The name of each person who was present and on whose behalf each attended (e.g., City, State, County, Railroad).

672. Was a project ever begun to improve this grade crossing by the installation of automatic gates? ____ If so, state:

a. The project number.

Objection. The information is privileged under 23 U.S.C. § 409 and is not relevant to the subject matter of the pending action or reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Southern Pacific Transportation Company produces herewith GMO file No. 69398.

b. Each proposed improvement and the party responsible for installing each improvement at this crossing.

c. The date the project was to begin.

d. The date the engineering plans for the project were

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e. The name and employer of each engineer who drafted the plans and the name of each entity with whom the engineer contracted.

f. The date the plans were approved.

g. The name of each person and employer who approved the plans.

673. State:

a. The date Southern Pacific first estimated the total cost of improving this crossing by installing automatic gates.

Please refer to answer and objection to interrogatory number 672.

b. The estimated cost.

c. The name of each party who it was contemplated would pay for any part of the cost of improvement and the part each would pay.

d. The name of each party who it was contemplated would reimburse any part of the cost of improvement.

e. The proportionate share of each reimbursed party.

674. Did the Corporation Commission order that this crossing be improved? ____ If so, state:

a. The improvements ordered.

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Please refer to answer and objection to interrogatory number 672.

b. Each party who was ordered to make each improvement.

c. The date of the order.

d. The name of each party who was to pay for the improvements and the proportionate share.

e. The total cost of the improvements.

675. Were automatic gates and/or cantilevered flashing lights installed at this crossing on or before April 10, 1990? ____ If not, state in detail each reason why you contend they were not installed and the name of each person or entity you contend was responsible for the failure to install the gates and cantilevered lights.

Please refer to answer and objection to interrogatory number 672.

676. Do you contend that if automatic gates had been installed before April 10, 1990, they probably would not have reduced the likelihood of this collision? ____ If not, state:

a. Each and every reason why you so contend.

Objection. Information is privileged under 23 U.S.C. § 409, is not relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence and calls for speculation. Without waiving this objection, however, Southern Pacific Transportation Company

believes, given Richard Isbell's failure to take due care for his own safety and the safety of others and his failure to heed the numerous audible and visual warnings of the existence of the crossing and the approach of the oncoming train, it is not likely that additional visual warnings would have reduced the likelihood of this collision.

b. The name and address of each person who will testify in support of your contention.

Please refer to answer to interrogatory number 609.

677. Do you contend that it was not feasible or practical from an economic or engineering standpoint for the Southern Pacific Transportation Company to have installed automatic gates at this grade crossing on or before April 10, 1990? ____ If so, state:

a. Each and every reason you so contend.

Objection. The information sought is privileged under 23 U.S.C. § 409, is not relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence, installation of warning devices at grade crossings in Arizona is governed by Arizona state law, and question is unintelligible (terms "feasible" or "practical" are not defined).

b. Each and every fact upon which you base your contention.

c. The name and last known address of each and every witness who will testify in support of your contention.

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678. State the maximum train speed authorized by Southern Pacific for freight trains at this grade crossing in:

a. 1985

25 mph

b. 1986

25 mph

c. 1987

25 mph

d. 1988

25 mph

e. 1989

25 mph

f. 1990

25 mph

679. Was a field review of this crossing attended by representatives of the Southern Pacific Transportation Company? ____ If so, state:

a. The name and last known address of each representative.

Please refer to objection and answer to interrogatory number 671.

b. The date of the field review.

c. Whether any of your representatives made a written record or report of findings or recommendations.

d. The author and date of each such report or record.

680. Do you contend that after public hearing and a finding that this grade crossing was sufficiently hazardous, the Arizona Corporation Commission did not have the legal authority to require that Southern Pacific install automatic gates at this grade crossing before April 10, 1990? ____ If you so contend, state why the Arizona Corporation Commission did not have such authority.

Please refer to objection to interrogatory number 677.

681. Do you contend that without an order from the Arizona Corporation Commission, Southern Pacific could not have installed automatic gates at this grade crossing before April 10, 1990? ____ If so, state:

a. Each and every reason you so contend.

Please refer to objection to interrogatory number 677.

b. Each and every fact upon which you base your contention.

c. The name and last known address of each and every witness who will testify in support of your contention.

682. Do you contend that unless and until it has been order by the Arizona Corporation Commission to do so, the Southern

Appendix A

Pacific Transportation Company had never installed automatic gates at any grade crossing before April 10, 1990? ____ If so, state:

a. Each and every reason you so contend.

Please refer to objection to interrogatory number 677.

b. Each and every fact upon which you base your contention.

c. The name and last known address of each and every witness who will testify in support of your contention.

683. State the date of each and every meeting between representatives of Southern Pacific and/or Maricopa County and/or the City of Chandler and/or the State of Arizona (whether others were present or not) after January 1, 1974 and prior to April 10, 1990 regarding the condition or improvement of this grade crossing.

Please refer to objection and answer to interrogatory number 672.

684. State the date, author and addressee of each and every letter in your possession to or from Southern Pacific regarding, this grade crossing on or before April 10, 1990. [In lieu of the above, you may simply produce each letter.]

Please refer to objection and answer to interrogatory number 672. Question is overbroad in scope and time.

685. State the date, author and addressee of each and every

letter in your possession to or from Southern Pacific regarding this grade crossing since April 10, 1990. [In lieu of the above, you may simply produce each letter.]

Please refer to objection and answer to interrogatory number 684.

686. Did Southern Pacific contest or object to the need for improvement of this grade crossing by the installation of automatic gates and/or other warning devices before April 10, 1990? ____ If so, state:

a. The date of each contest or objection.

Please refer to objection to interrogatory number 677.

b. The name of the person who made it.

c. The name and last known address of the person to whom it was made.

d. Whether it was made in writing or orally.

687. Were automatic gates ever installed at this grade crossing? ____ If so, state:

a. The entity that ordered the installation and the date ordered.

Please refer to objection and answer to interrogatory number 672.

b. The entity that was ordered to install them.

c. The entity that installed them.

d. The date of each installation.

* * *

Arizona Corporation Commission? ____ If so:

a. Identify each such crossing.

Objection. Please refer to objection set forth in interrogatory number 677. Without waiving this objection, to the best of Southern Pacific Transportation Company's knowledge, no gates have been installed at any public grade crossing within the State of Arizona without the approval of the Arizona Corporation Commission within the period indicated.

b. The date of installation.

698. Did Southern Pacific between January 1, 1985 and April 10, 1990 inclusive, have any written criteria for determining whether a particular grade crossing in Arizona was sufficiently hazardous so that Southern Pacific would install, or recommend the installation of automatic gates in the interest of public safety? ____ If so, identify:

a. Each such writing.

Objection. Please refer to objection to interrogatory number 672. Without waving this objection, Southern Pacific Transportation Company has no such criteria, although Southern Pacific Transportation Company follows certain recommended practices of the Manual on Uniform Traffic

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Control Devices and similar publications regarding the actual installation of grade crossing warning devices.

b. The name of the person in charge of the department at Southern Pacific responsible for making that determination.

699. Did Southern Pacific, between January 1, 1985 and April 10, 1990 inclusive, ever determine that a particular grade crossing in Arizona was sufficiently hazardous so as to install, or recommend the installation of, automatic gates in the interest of public safety? ____ If so, identify:

a. The location of each such crossing.

Please refer to answer and objection to interrogatories number 672 and 698.

b. The name and address of each person responsible for making that determination.

700. Did Southern Pacific, between January 1, 1985 and April 10, 1990 have a Department, Division and/or person with the responsibility of inspecting grade crossings in the Chandler area to determine if in need of installation of automatic gates? ____ If so, state:

a. The name of each Department or Division.

Objection. Decisions regarding the installation of automatic gates are made by the local governmental agencies involved and by the Arizona Corporation Commission and not by Southern Pacific Transportation Company. See page 54(a).

b. The name and title of each person with that responsibility.

701. Did Southern Pacific, between January 1, 1985 and April 10, 1990 have a Department, Division and/or person with the responsibility of inspecting grade crossings in the Chandler area to determine if they were reasonably safe for vehicular traffic? ____ If so, state:

a. The name of each Department or Division.

Please refer to answer and objection to interrogatory number 700.

b. The name and title of each person with that responsibility.

* * *

704. Did the Southern Pacific Transportation Company do the construction work at the Chandler Heights Road public grade crossing in 1990 or did it have a general contractor do it?

Objection. "Construction work" is not defined. Please refer also to objection to interrogatory number 672. Without waiving this objection, actual installation work was performed by Southern Pacific.

* * *

706. State each and every reason why you contend that construction for the installation of automatic gates and warning devices ordered by the Corporation Commission on January 22, 1986 was not begun until June 22, 1990.

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Objection. Please refer to objection to interrogatory number 672.

707. State the date that construction started at the Chandler Heights Road public grade crossing for the installation of automatic gates and other warning devices ordered installed by the Arizona Corporation Commission on January 22, 1986.

Approximately July 24, 1990.

* * *

709. State the date of completion of construction for the installation of automatic gates and other warning devices ordered installed by the Arizona Corporation Commission on January 22, 1986.

Objection. Please refer to objection to interrogatory number 672. Without waiving this objection, gates were placed in service on approximately October 8, 1990.

710. State the date that the automatic gates and other warning devices ordered installed by the Arizona Corporation Commission on January 22, 1986 were actually installed.

Please refer to objection and answer to interrogatory number 709.

711. State the date that the automatic gates and other warning devices ordered installed by the Arizona Corporation Commission on January 22, 1986 were made operational.

Please refer to objection and answer to interrogatory number 709.

Appendix A

712. State (or provide an itemization of) the total actual costs to install the grade crossing warning system ordered by the Arizona Corporation Commission in January, 1986, and itemize the cost of equipment or material, labor and other costs.

Unknown at this time. Some information is in the GMO file produced concurrently herewith.

713. State the name and last known address of each person at Southern Pacific Transportation Company whose duties included the responsibility to see that the Arizona Corporation Commission's order of January 22, 1986 was complied with Bob Prince, Southern Pacific Transportation Company, Monterey Park, California.

DATED this 5th day of August, 1991.

* * *

Appendix A

VERIFICATION

STATE OF ARIZONA)
)
County of Maricopa)

Erwin Owens, being first duly sworn, upon deposes and says: That he is a claims representative of Southern Pacific Transportation Company, defendant herein; that he has read the foregoing answers to non-uniform interrogatories; knows the contents thereof; and that the same are true, except those answered upon information and belief, and as to those, he believes them to be true.

s/ Erwin Owens
Erwin Owens

SUBSCRIBED AND SWORN to before me this 22nd day of October, 1991, by Erwin Owens.

s/ Shirley D. Crozier
Notary Public

My commission expires:
8-8-92

Appendix A

* * *

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

NO. CV 91-19192

NON-UNIFORM
INTERROGATORIES
(3rd Set)

AND ANSWERS

* * *

TO: Defendant Southern Pacific Transportation Company

Under authority of Rule 33, Arizona Rules of Civil Procedure, the plaintiffs hereby request that the defendant Southern Pacific Transportation Company answer in writing and under oath, within thirty (30) days from the receipt hereof, the following interrogatories:

714. State the number of grade crossings in Arizona as of January 22, 1986 at which the Arizona Corporation Commission had entered an order granting a governmental entity authority to have the Southern Pacific Transportation Company install automatic gates but at which the gates had not yet been installed.

The information is privileged under 23 U.S.C. § 409 and is not relevant to the subject matter of the pending action or reasonably

calculated to lead to the discovery of admissible evidence. The interrogatory is, in addition, overbroad.

715. For each grade crossing referred to in answer to Non-Uniform Interrogatory No. 714, state:

a. The date of the Corporation Commission Order

OBJECTION. See objection to interrogatory number 714, above.

b. The location of the grade crossing.

c. The date the gates were operational.

d. Whether the cost of installation was paid for in part by federal funds.

716. State the number of grade crossings in Arizona as of January 22, 1986 at which the Arizona Corporation Commission had ordered the Southern Pacific Transportation Company install automatic gates but at which the gates had not yet been installed.

OBJECTION. See objection to interrogatory number 714, above.

717. For each grade crossing referred to in answer to Non-Uniform Interrogatory No. 716, state:

a. The date of the Corporation Commission Order

OBJECTION. See objection to interrogatory number 714, above.

b. The location of the grade crossing.

c. The date the gates were operational.

d. Whether the cost of installation was paid for in part by federal funds.

718. State the number of grade crossings referred to in Non-Uniform Interrogatory No. 714 at which the Southern Pacific Transportation Company had installed the automatic gates as of April 10, 1990.

OBJECTION. See objection to interrogatory number 714, above.

719. State the number of grade crossings referred to in Non-Uniform Interrogatory No. 716 at which the Southern Pacific Transportation Company had installed the automatic gates as of April 10, 1990.

OBJECTION. See objection to interrogatory number 714, above.

720. State the location of each grade crossing in Arizona at which the Arizona Corporation Commission had given a governmental entity authority to have Southern Pacific install automatic gates but at which the gates had not yet been installed as of April 10, 1990.

OBJECTION. See objection to interrogatory number 714, above.

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721. For each location identified in the preceding interrogatory, state:

a. The date of the order.

b. The date the gates were made operational.

c. Whether the installation was paid for in part by federal funds.

722. State the location of each grade crossing in Arizona at which the Arizona Corporation Commission had ordered the Southern Pacific install automatic gates but at which the gates had not yet been installed as of April 10, 1990.

OBJECTION. See objection to interrogatory number 714, above.

723. For each location identified in the preceding interrogatory, state:

a. The date of the order.

b. The date the gates were made operational.

c. Whether the installation was paid for in part by federal funds.

724. Has the Corporation Commission granted authority to a governmental entity to have the Southern Pacific Transportation Company install, or has it ordered the Southern Pacific Transportation Company to install, automatic gates at any grade crossing in Arizona since January 22, 1986? If so, state:

Appendix A

a. The number of such crossings.

OBJECTION. See objection to interrogatory number 714, above.

b. The location of each crossing.

c. The date of the Order.

d. The date of installation.

e. Whether the installation was paid for by federal funds.

DATED this 11th day of May, 1992.

* * *

Appendix A

* * *

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

NO. CV 91-19192

NON-UNIFORM
INTERROGATORIES
(4th Set)

* * *

TO: Defendant State of Arizona

Under authority of Rule 33, Arizona Rules of Civil Procedure, the plaintiffs hereby request that the defendant State of Arizona answer in writing and under oath, within thirty (30) days from the receipt hereof, the following interrogatories:

684. State the number of grade crossings in the State of Arizona as of February 2, 1983.

685. State the number of grade crossings in the State of Arizona as of February 2, 1983 with no active warning device (i.e. those with crossbucks only).

686. State the number of grade crossings in the State of Arizona as of February 2, 1983 with flashing lights but no automatic gates.

687. State the number of grade crossings in the State of

Arizona as of February 2, 1983 with wig-wag signals but no gates.

688. State the number of grade crossings in the State of Arizona as of February 2, 1983 with automatic gates.

689. State the number of grade crossings in the State of Arizona as of February 2, 1983 with gates that were not automatic.

690. State the number of grade crossings in the State of Arizona as of April 10, 1990.

691. State the number of grade crossings in the State of Arizona as of April 10, 1990 with no active warning device (i.e. with crossbucks only).

692. State the number of grade crossings in the State of Arizona as of April 10, 1990 with flashing lights but not automatic gates.

693. State the number of grade crossings in the State of Arizona as of April 10, 1990 with wig-wag signals but no gates.

694. State the number of grade crossings in the State of Arizona as of April 10, 1990 with automatic gates.

695. State the number of grade crossings in the State of Arizona as of April 10, 1990 with gates that were not automatic.

696. State the location of each grade crossing in the State of Arizona at which automatic gates had not yet been installed as of April 10, 1990 but for which the Corporation Commission had

already entered an order either granting authority for the installation and/or ordering the gates be installed.

697. For each location identified in the preceding interrogatory, state:

a. The name of the railroad that was to install the automatic gates.

b. The date of the Corporation Commission Order.

c. The date the gates were made operational.

d. Whether the installation was paid for in part by federal funds.

698. State the location of each grade crossing in the State of Arizona at which flashing lights had not yet been installed as of April 10, 1990 but for which the Corporation Commission had already entered an order either granting authority for the installation of flashing lights only (no gates) and/or ordering the lights be installed.

699. For each location identified in the preceding interrogatory, state:

a. The name of the railroad that was to install the flashing lights.

b. The date of the Order.

c. The date the flashing lights were made operational.

d. Whether the installation was paid for in part by federal funds.

700. Has the Corporation Commission granted authority to install, or ordered the installation of only flashing lights (without gates) at any grade crossing in Arizona since January 22, 1986? ____ If so, state:

a. The number of such crossings.

b. The location of each crossing.

c. The date of the Order.

d. The date of installation.

e. The name of the railroad that was to, or did, make the installation.

f. Whether the installation was paid for out of federal funds.

701. Has the Corporation Commission granted authority to install, or ordered the installation of, automatic gates at any grade crossing in Arizona since January 22, 1986? ____ If so, state:

a. The number of such crossings.

b. The location of each crossing.

c. The date of the Order.

d. The date of installation.

Appendix A

e. The name of the railroad who was to, or did, make the installation.

f. Whether the installation was paid for out of federal funds.

DATED this 11th day of May, 1992.

* * *

Appendix A

* * *

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

NO. CV 91-19192

THIRD REQUEST FOR
PRODUCTION OF
DOCUMENTS

* * *

TO: Defendant State of Arizona

COMES NOW the plaintiffs, by and through counsel undersigned, and pursuant to Rule 34 of the Arizona Rules of Civil Procedure hereby request that the defendant State of Arizona produce and permit plaintiffs to inspect and/or copy the following designated items within thirty (30) days from the date of service.

1. Any and all orders referred to in Non-Uniform Interrogatory No. 696.

2. Any and all orders referred to in Non-Uniform Interrogatory No. 698.

3. Any and all orders referred to in Non-Uniform Interrogatory No. 700.

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4. Any and all orders referred to in Non-Uniform Interrogatory No. 701.

DATED this 11th day of May, 1992.

* * *

Supreme Court, U. S.
FILED
OCT 6 1995
CLERK

No. 95-134

In The Supreme Court of the United States

October Term, 1995

Southern Pacific Transportation Company,
Petitioner,

v.

Mary E. Isbell, Dennis Isbell, David Isbell, John Isbell, Marsha Isbell, Joseph Isbell, The State of Arizona, Maricopa County, The City of Chandler, and The Maricopa County Superior Court,
Respondents.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

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PETITIONER'S REPLY BRIEF

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October 6, 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-134

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

MARY E. ISBELL, DENNIS ISBELL, DAVID ISBELL, JOHN ISBELL, MARSHA ISBELL, JOSEPH ISBELL, THE STATE OF ARIZONA, MARICOPA COUNTY, THE CITY OF CHANDLER, and THE MARICOPA COUNTY SUPERIOR COURT,
Respondents.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

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PETITIONER'S REPLY BRIEF

Pursuant to Rule 15.6, Southern Pacific Transportation Company ("Southern Pacific") respectfully files this brief reply in support of its petition for a writ of certiorari to review the opinion of the Arizona Supreme Court.[1]

Although the majority of the arguments set forth by Isbell in the brief in opposition to the petition for a writ

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[1] The Rule 29.1 Statement contained in the Petition remains correct.

of certiorari are refuted by Southern Pacific's petition, and are therefore inappropriate to address through this reply under Rule 15.6, the following points were not directly raised in the petition, and therefore need to be addressed.

1. Isbell's suggestion that § 409 does not protect information generated after an order regarding improvements has been entered (Brief in Opposition at 14-15) is incorrect. In addition to protecting information gathered to plan safety enhancements, § 409 specifically protects information used in "evaluating" grade crossings and in "identifying" hazards, both of which frequently require a retrospective analysis. The Arizona Corporation Commission can and does evaluate a crossing after an improvement to determine whether the improvements are having the desired effect or whether even greater improvements are necessary, and whether similar improvements may be worthwhile at other sites or whether its limited funds would best be spent in a different manner.

Moreover, § 409 explicitly protects data gathered pursuant to 23 U.S.C. §§ 130(d) and 152(a). Section 130 (d) requires the states to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and implement a schedule of projects for this purpose." Similarly, § 152(a) declares:

> Each state shall *conduct and systematically maintain an engineering survey* of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement. (Emphasis added.)

Neither of these statutes suggests a distinction between information gathered before and after an order authoriz-

ing improvements is entered for purposes of § 409, and none exists.

Finally, Isbell's proposed distinction ignores Congress' purpose in enacting § 409. Courts uniformly hold that § 409's purpose is to promote the public safety and to encourage candor by protecting safety-related information gathered in connection with public highways, including railroad crossings. Drawing a distinction between information received before and after an order authorizing improvements finds no support in the statute or the case law.

2. This case is ripe for review, and should be reviewed. It is true that the Arizona Supreme Court refused to evaluate any of the specific discovery requests at issue. That court did, however, issue an opinion which is demonstrably incorrect, and the lower courts in Arizona will have no choice but to order the production of protected information in accordance with that opinion. For example, Isbell admits that she seeks to discover "factual observations made by persons involved in the review process." Brief in Opposition at 9. Under any rational reading of § 409, those observations constitute data compiled for safety purposes, and therefore are protected by § 409, even though the Arizona Supreme Court's opinion incorrectly restricts § 409's protection to documents.

It is not sufficient to leave these issues for another day, nor to say that they can be properly addressed after the trial. Through the 1991 amendment to § 409, Congress expressly shielded information connected with its safety program from discovery. That safety program covers all roadway hazards, not merely grade crossing hazards. Congress' purpose in enacting § 409 is to facilitate candor in its safety program and prevent private litigants from taking advantage of federally required record-keeping. Petition at 6. The Arizona Supreme Court's decision casts a pall over Congress' safety program, both inside and outside of Arizona.

CONCLUSION

Broad public interests are at stake. The scope of § 409 is an issue that recurs on a regular basis (indeed, *State of Louisiana v. Poole*, No. 95-172, October Term 1995, involved an unreported decision on the scope of § 409), and the Arizona Supreme Court's published opinion is plainly wrong and will thwart Congress' purposes if left uncorrected. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 6, 1995